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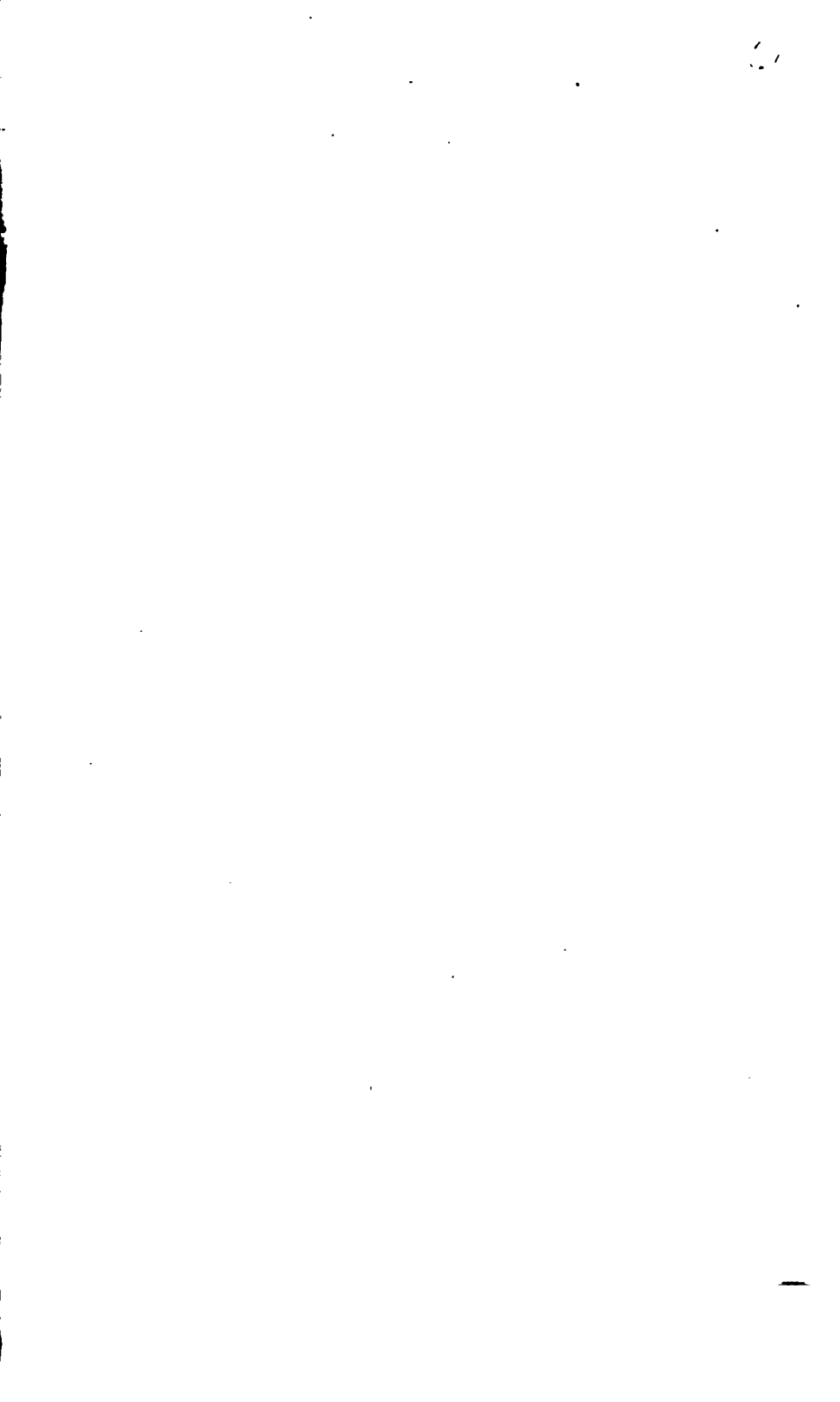
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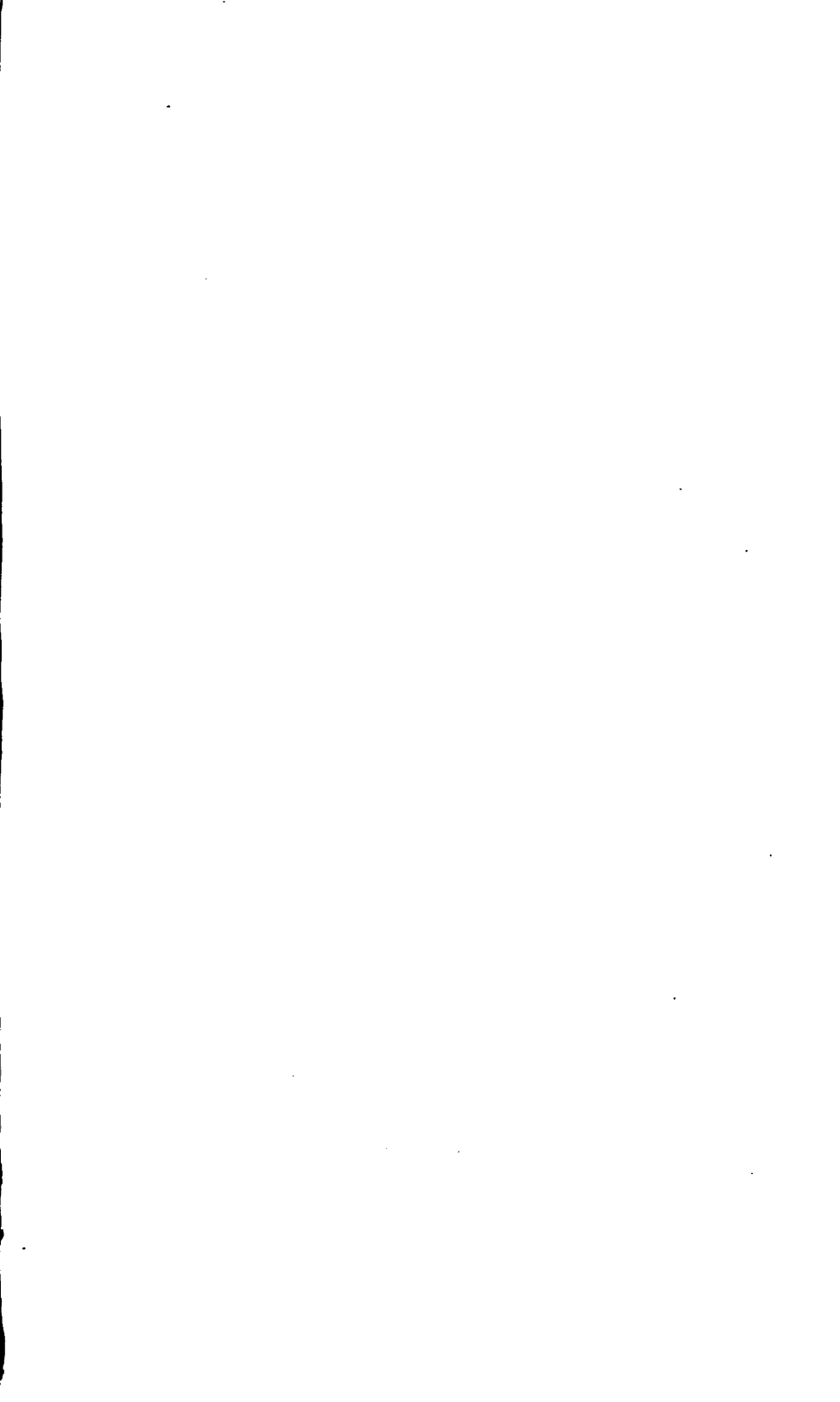
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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER

REPORTER

VOLUME 93

DECISIONS BETWEEN JULY 1 AND OCTOBER 21, 1919.

**SAN FRANCISCO
BANCROFT-WHITNEY COMPANY**

1920

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IN THE

STATE OF OREGON

October 21, 1919.

First Judicial District—

Jackson..... } FRANK M. CALKINS, Medford.
Josephine..... }

Second Judicial District.—

Benton.....	}	JAMES W. HAMILTON, Roseburg.
Douglas.....		
Curry.....		
Cook.....		JOHN S. COKE, Marshfield.
Lane.....		
Lincoln.....		GEORGE F. SKIPWORTH, Eugene.

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Fourth Judicial District—

	JOHN P. KAVANAUGH, Department No. 1, Portland.
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Fifth Judicial District—

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Sixth Judicial District—

Morrow..... } GILBERT W. PHELPS, Pendleton.
Umatilla..... }

Seventh Judicial District—

Hood River..... } FRED W. WILSON, The Dalles.
Wasco..... }

Eighth Judicial District—

Baker.....GUSTAV ANDERSON, Baker.

Ninth Judicial District—

Grant..... } DALTON BIGGS, Ontario.
Harney..... }
Malheur..... }

Tenth Judicial District—

Union.....	}	JOHN W. KNOWLES, La Grande.
Wallowa.....		

Eleventh Judicial District—

Gilliam.....	}	DAVID R. PARKER, Condon.
Sherman.....		
Wheeler.....		

Twelfth Judicial District—

Polk.....	}	HARRY H. BELT, Dallas.
Yamhill.....		

Thirteenth Judicial District—

Klamath...	DELMON V. KUYKENDALL, Klamath Falls.
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Fourteenth Judicial District—

Lake.....	L. F. CONN, Lakeview.
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Fifteenth Judicial District—

Crook.....	}	T. E. J. DUFFEY, Prineville.
Deschutes.....		
Jefferson.....		

Sixteenth Judicial District—

Tillamook.....	}	GEORGE R. BAGLEY, Hillsboro.
Washington.....		

Seventeenth Judicial District—

Clatsop.....	}	JAMES A. EAKIN, Astoria.
Columbia.....		

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

October 21, 1919.

County.	Name.	Official Address.
Baker.....	Levens, W. S.....	Baker
Benton.....	Clarke, Arthur	Corvallis
Clackamas.....	Hedges, Gilbert L.....	Oregon City
Clatsop.....	Barratt, Jasper J.....	Astoria
Columbia.....	Metsker, Glen R.....	St. Helens
Coos.....	Hall, John F.....	Marshfield
Crook.....	Wirtz, Willard H.....	Prineville
Curry.....	Buffington, Collier H.....	Gold Beach
Deschutes.....	Moore, Arthur J.....	Bend
Douglas.....	Neuner, George, Jr.....	Roseburg
Gilliam.....	Weinke, T. A.....	Condon
Grant.....	Ashford, Phil.....	Canyon City
Harney.....	Biggs, M. A.	Burns
Hood River.....	Derby, A. J.....	Hood River
Jackson.....	Roberts, G. M.	Medford
Jefferson.....	Boylan, Bert C.	Metolius
Josephine.....	Miller, W. T.....	Grants Pass
Klamath.....	Duncan, William M.....	Klamath Falls
Lake.....	McKinney, T. S.	Silver Lake
Lane.....	Ray, L. L.	Eugene
Lincoln.....	Geo. B. McCluskey*.....	Toledo
Linn.....	Hill, Gale S.....	Albany
Malheur.....	Swagler, B. W.....	Malheur
Marion.....	Gehlhar, Max	Salem
Morrow.....	Notson, Samuel E.....	Heppner
Multnomah.....	Evans, Walter H.....	Portland
Polk.....	Piasecki, E. K.	Dallas
Sherman.....	Huddleston, C. M.....	Wasco
Tillamook.....	Goyne, T. H.	Tillamook
Umatilla.....	Keator, R. I.	Pendleton
Union.....	Hodgin, John S.	La Grande
Wallowa.....	Fairchild, Abijah	Enterprise
Wasco.....	Galloway, Francis V.	The Dalles
Washington.....	Tongue, E. B.....	Hillsboro
Wheeler.....	Trill, Wallace G.....	Fossil
Yamhill.....	Conner, Roswell L.	McMinnville

*Appointed Sept. 21, 1919, succeeding Calvin E. Hawkins, resigned.

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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Argued June 18, affirmed July 1, 1919.

WADE v. MARTIN.

(181 Pac. 988.)

Partnership—Silent Partner—Evidence.

1. Plaintiff, in action for half of the expenses of an option taken in his name, *held* to have failed to establish by a preponderance of the evidence that defendant was a silent partner in the transaction.

[As to specific performance of optional contracts, see note in *Ann. Cas.* 1913A, 362.]

From Multnomah: ROBERT G. MORROW, Judge.

Department 2.

For his cause of action plaintiff alleges that about January 1, 1910, he entered into an agreement with the defendant by which the plaintiff was to procure an option to purchase a tract of land of about 917 acres in Wallowa County, from one Ewing; that such option when obtained should be taken in the name of the plaintiff only, but that the defendant should have an equal interest therein with the plaintiff, and each should bear one half of the expenses and should share equally in any proceeds realized under the option.

Pursuant to said agreement plaintiff did procure an option for a period of five years from January 3, 1910, and plaintiff took and accepted said option under the express stipulation that the defendant was in all things equally interested therein with himself. The purchase price of the land was \$25 per acre, and the option provided that in consideration thereof the plaintiff should pay \$150 per year for the first three years and \$250 for each of the last two years of the term of the option and that such payments should be evidenced by a promissory note to be executed on January 3d of each year. On January 3, 1910, pursuant to the terms of the option, the plaintiff executed in favor of Ewing the first \$150 note, to become due and payable January 3, 1911. The complaint alleges that on or about its maturity the plaintiff paid that note and, according to the terms of the agreement between them the defendant paid him one half of the amount thereof; that about January 3, 1911, the plaintiff executed to Ewing the second promissory note for \$150, which became due one year from that date and which he paid at maturity, and that as before the defendant reimbursed the plaintiff for one half the amount of the note.

It is averred that about January 1, 1912, Ewing sold and conveyed the land to Fargo and Baker; that for failure to execute and pay the third promissory note for \$150 they commenced an action against the plaintiff to recover that amount; that after a contest they recovered judgment for \$150 and costs, and that the defendant paid to the plaintiff one half of that amount. The plaintiff further avers that thereafter Fargo and Baker commenced an action against him to recover upon the fourth and fifth yearly payments of \$250 each provided for in the option; that he and the defendant

mutually employed counsel to defend, and contested the action; that the defendant agreed to pay plaintiff one half of the expense thereof; that a judgment was finally entered against the plaintiff for the full amount prayed for, which plaintiff paid in full; that the defendant promised and agreed to repay the plaintiff one half of the final judgment of \$804.88, and that the latter has demanded and defendant has refused payment. The plaintiff asks judgment for the amount with accrued interest.

In his answer the defendant denies each material allegation of the complaint and avers that without consideration, and as an accommodation only, he signed the first promissory note for \$150. The plaintiff's reply denied the new matter of the answer and by stipulation the case was tried without a jury.

When the plaintiff rested his case the defendant filed a motion for nonsuit, which was overruled. The defendant introduced his evidence and after all the testimony was taken, again moved the court for judgment of nonsuit upon the grounds: First, that the proof was insufficient; and second, that the alleged transaction was a partnership for which a recovery could not be had in an action at law, as "the only remedy of the one partner who claims to have made disbursements on behalf of the firm is that of an accounting in equity."

The case was taken under advisement by the court, which without making any findings of fact or conclusions of law rendered a judgment "that the motion of defendant for an involuntary nonsuit should have been allowed, and it is now hereby adjudged that plaintiff take nothing herein; that defendant go hence without day," and that he have judgment for costs. The plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Conrad P. Olson*.

For respondent there was a brief over the names of *Mr. Charles A. Hart* and *Mr. W. H. Fowler*, with an oral argument by *Mr. Hart*.

JOHNS, J.—1. Under our view of this case, it will not be necessary to decide the legal questions ably presented by opposing attorneys. As the material allegations of the complaint were denied by the defendant, it devolved upon the plaintiff to establish them by a preponderance of the evidence. One of these allegations was that the defendant was a “silent partner” of the plaintiff in the Ewing contract and that for value he had promised and agreed with the plaintiff that he would pay one half of the latter’s liability under that contract and his own share of the expense arising therefrom.

The case is peculiar and the alleged contract is founded upon parol testimony only. The plaintiff’s testimony sustains the allegations of the complaint, but is flatly contradicted by that of the defendant. The testimony of *Mr. Lomax*, who was formerly his attorney, tends to corroborate the plaintiff, and the evidence of *Mr. Fowler*, formerly of counsel for the defendant, tends to substantiate the latter’s testimony. There is a sharp conflict in the effect of the testimony of the two attorneys and it is very apparent that as between the plaintiff and the defendant one of them is not telling the truth. There is much of the evidence that sustains the theory of either litigant, but after a careful reading of all the record once and a large portion of it the second time, we are impressed with the direct, clear and positive testimony of the defendant.

There is another feature of the evidence to which we attach importance. During the trial of the case of Fargo and Baker to recover from this plaintiff upon one of the notes which he executed under the Ewing contract, at the instance of counsel the court took a recess. At that time Fargo and Baker as plaintiffs were represented by Hart and Fowler, who are now attorneys for the defendant in this action, and Wade, the plaintiff here, as defendant in that action was represented by Lomax as his attorney. Martin, the defendant in the present action, was in court as a witness at the trial of that cause. During the adjournment there was a conference between the litigants in that case and their respective attorneys for the purpose of arriving at a final settlement of all matters then in dispute between them. This occurred in a room connecting with and adjoining the courtroom where the trial was had. A general discussion ensued and different memorandum contracts were prepared by the respective attorneys, one of which was that in lieu of the Ewing option at a price of \$25 per acre the plaintiff here should purchase the lands at an agreed price of \$20 per acre. All of these negotiations consumed more than an hour and there is no claim or pretense that the defendant Martin was present at any time or that he was then consulted, yet he was close at hand in an adjoining room.

Counsel for the plaintiff contends that the defendant was not consulted for the reason that he was only a "silent partner." This was more than three years after the alleged secret agreement between them and there is nothing in the record which tends to show that the plaintiff and the defendant had ever conferred about or discussed the subject matter of the proposed

agreement at any previous time, yet if the defendant was a "silent partner" it was an important matter to him and if consummated the plaintiff would have become the sole purchaser of nine hundred acres of land at a price reduced five dollars per acre below that of the Ewing option, and the option would have been wiped out and merged in the purchase. This is strong evidence that the defendant was not a "silent partner" in the Ewing contract. It is also significant that during the period of more than seven years of the alleged silent partnership there is no written evidence of its existence.

While some of the testimony is contradictory and there is a direct conflict between that of the plaintiff and that of the defendant, as we analyze it the plaintiff has failed to establish his case by a preponderance of the evidence.

The judgment is affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued April 18, affirmed July 1, 1919.

HARTWIG v. RUSHING.*

(182 Pac. 177.)

Fraudulent Conveyances—Bulk Sales Law—Applicability—Consideration—"Sale."

1. Construed as a whole, bulk sales law (Sections 6069-6072, L. O. L.), applies, not only to sales for money, but also to sales for property measured in money; "sale or transfer" being spoken of, and direction being given for acts "before paying or delivering * * any part of the purchase price or consideration."

*Authorities passing on the question of remedy of creditors where sale is made in violation of bulk sales law, are collated in notes in 39 L. R. A. (N. S.) 374; L. R. A. 1916B, 974.

On notice to creditors under bulk sales law, see note in L. R. A. 1917F, 230.

REPORTER.

Exchange of Property—"Barter."

2. A "barter" or "exchange of properties" occurs where one article is exchanged for another; no price in money being fixed upon either.

Words and Phrases—"Cash."

3. Ordinarily, the word "cash" means money, but it is frequently used as a term meaning the opposite of credit.

Fraudulent Conveyances—Bulk Sales Law.

4. Bulk sales law (Sections 6069-6072, L. O. L.) is not limited to protection of mercantile creditors only; it speaking of "all of the creditors," "all of his creditors," and "any and all creditors."

Fraudulent Conveyances—Bulk Sales Law—Creditors Entitled to Notice.

5. Bulk sales law (Sections 6069-6072, L. O. L.) requires notice to creditors whose demands are not yet due; statement required of seller being of all creditors, with amount of indebtedness due or owing, or to become due or owing.

Fraudulent Conveyances—Bulk Sales Law—Remedy of Creditors—Purchaser from Grantee.

6. A sale without compliance with bulk sales law being by provision of Section 6070, L. O. L., conclusively presumed fraudulent and void, a trust in favor of creditors of the seller, he being without assets and they having reduced their claim to judgment, entitling them to equitable remedy, will be impressed on land obtained by the buyer of the stock of goods in exchange therefor, and then conveyed to others without consideration.

[As for remedies of creditors for violation of bulk sales law, see note in *Ann. Cas.* 1916C, 928.]

From Multnomah: ROBERT TUCKER, Judge.

Department 1.

The plaintiff William H. Hartwig is endeavoring to impress a trust upon certain lands so that he can collect a money judgment which he obtained against George Hartwig, who sold a hardware store and stock of goods to C. C. Rushing without complying with the bulk sales law. William H. Hartwig and George Hartwig are brothers; the former was a resident of Iowa, while the latter lived in Oregon. George Hartwig informed his brother that he wished to purchase a hardware store owned by Frank L. Miller in Aurora, Oregon. George Hartwig had \$4,000 in cash and a

tract of timber land in Idaho, but he needed more money to consummate the purchase. For the purpose of enabling George Hartwig to buy the store the two Hartwigs borrowed \$5,500 from the City National Bank of Tipton, Iowa, on February 19, 1910, and gave their promissory note to the bank for that amount payable one year after that date. In February, 1910, George Hartwig bought the store from Miller for \$15,700. Miller received in payment for the store the \$5,500 which had been borrowed from the Iowa bank, \$3,300 of the \$4,000 which George Hartwig already had, the Idaho timber land at \$3,500 and a note for the balance of the purchase price.

William H. Hartwig paid the note which he and his brother had given to the Iowa bank; and for the purpose of evidencing the resulting indebtedness George Hartwig gave his note to William H. Hartwig for \$5,500, payable, with interest, five years after February 18, 1911, its date.

George Hartwig took possession of the store and continued to operate it until September 11, 1911, when he transferred it to C. C. Rushing. There is in evidence a writing which reads as follows:

“Aurora, Oregon, Aug. 28th, 1911.

“This agreement entered into the above day by & between Geo. Hartwig, of Aurora, Ore., party of the first part & C. C. Rushing of Portland, Ore., party of the second part, Witnesseth:—Said first party has sold his stock of goods in Aurora to said second party & has taken as payment for said stock of goods a 31 acre prune ranch near Vancouver, Wash., at \$31,000.

“Said first party is to take invoice of said stock of goods one day this week at invoice cost for all first class goods & others put in at value & the first party is to pay same as part payment on the prune ranch less an amt. owed for goods to become due amtg. to

between \$2500 & \$4000, to be ascertained by the second part. The balance due on the prune ranch is to be paid by mortgage on same due in two, three & four yrs. 7% int., payable semiannually. The first party assumes \$4,000 now against said prune ranch, due in 1 & 2 yrs.

"Witness our hands the day & year first above written.

"GEO. HARTWIG.

"C. C. RUSHING."

The stock of goods was invoiced by George Hartwig and Rushing with the assistance of some representatives of certain wholesalers who were creditors of Hartwig. The parties are not agreed as to the total invoice price of the stock of goods sold to Rushing; the figures were between \$13,000 and \$18,500. George Hartwig claims that the stock of hardware invoiced \$16,820 and with 10 per cent added for freight amounted to \$18,500. The uncontradicted evidence of George Hartwig is that he and Rushing agreed upon \$300 as the price of the fixtures and furniture. It is conceded that George Hartwig gave a mortgage to C. C. Rushing for \$17,274.54 on the 31 acre prune orchard; and hence this fact considered in connection with the writing dated August 28, 1911, would indicate that the stock of goods, including the fixtures and furniture valued at \$300, was invoiced at \$13,725.46. Soon after the store was transferred to Rushing he paid a total of \$4,367.34 to certain wholesalers for goods which they had sold to Hartwig. After selling the store Hartwig collected about \$1,500 on book accounts due him and used the collections in making payments to some of his creditors.

Rushing carried on the hardware business until October 23, 1911, when he transferred the store to

George and Lena Ehlen in exchange for about 79 acres of land in Marion County. Afterwards on November 28, 1911, C. C. Rushing deeded the Marion County land to Annie L. Kent in exchange for three lots in the First Addition to Cherrydale in Portland and certain personal property "known as the furnishings of the Almira Apartments." The conveyance of the Cherrydale lots was made to "J. G. Rushing."

C. C. Rushing died on January 6, 1912, and on January 27th, following, his widow Johnie Gertrude Rushing was appointed administratrix of his estate; and she was also appointed the guardian of the estate and person of the six year old daughter Maxine C. Rushing. On October 8, 1912, Johnie Gertrude Rushing, as administratrix, traded the "furnishings of the Almira Apartments" for a lot in Overlook Addition in Portland and took a deed in the name of John C. Shillock as trustee of the C. C. Rushing estate; and subsequently on June 14, 1916, the trustee conveyed the Overlook lot to Maxine C. Rushing pursuant to an order made by the County Court in the settlement of the C. C. Rushing estate.

The 31 acre orchard was conveyed to George Hartwig, subject to a mortgage of \$4,000 held by George W. Seward; and Hartwig then gave a second mortgage to C. C. Rushing for \$17,274.54 to cover the difference between the value of the hardware store and \$31,000 the agreed value of the prune orchard. The Seward mortgage which was assumed by Hartwig was offset by George Hartwig's indebtedness to wholesalers whom Rushing agreed to pay. The Seward mortgage was foreclosed in 1913 and the prune orchard was acquired through foreclosure proceedings by O. W. Olson, as trustee for Johnie Gertrude Rushing, who

furnished the necessary funds out of life insurance paid to her on account of the death of her husband.

It is not necessary to determine whether George Hartwig was mentally incapacitated to transact business when he sold the store; but it is sufficient to say that the evidence shows clearly that he was not in good physical or mental health.

George Hartwig claims that C. C. Rushing knew about the former's indebtedness to his brother and that Rushing agreed to pay William H. Hartwig; and in this connection we quote as follows from the testimony of George Hartwig.

"Why, I agreed with him that I would not let my brother know; wait a little while until he could get the cash to pay that note; that the note wasn't due yet. It ran for five years."

George Hartwig insisted that C. C. Rushing agreed to pay the note which the former had given to William H. Hartwig; but the writing signed by C. C. Rushing and George Hartwig contradicts the contention made by the latter.

It is true that George Hartwig explains that the writing was not signed until after he had completed the sale to Rushing and that he attached his signature to some writing without reading it and for the purpose of accommodating Rushing. However, the admitted fact of the amount of the mortgage given by Hartwig on the prune orchard taken together with other evidence in the record points to the conclusion that Rushing did not agree to pay the note held by William H. Hartwig.

The uncontradicted evidence is that William H. Hartwig did not learn of the sale of the hardware store to Rushing until 1915 and that upon learning of

the sale he came from Iowa to Oregon in July, 1915, and placed the matter in the hands of attorneys. On May 16, 1916, William H. Hartwig obtained a judgment on the promissory note against George Hartwig for \$7,626.52 in the Circuit Court of Multnomah County; and on the following day, May 17, 1916, William H. Hartwig commenced this suit against George Hartwig, Johnie Gertrude Rushing, as an individual and as administratrix of the estate of C. C. Rushing, deceased, and against Maxine C. Rushing, praying in his complaint that the court decree that Johnie Gertrude Rushing holds the Cherrydale lots and that Maxine C. Rushing holds the Overlook lot "merely in trust" on account of being the proceeds derived from the sale of the hardware store without first complying with the bulk sales law. There was a decree in accordance with the prayer of the complaint; and all the defendants, except George Hartwig, appealed.

AFFIRMED.

For appellants there was a brief over the names of *Mr. Jay Bowerman* and *Messrs. Emmons & Webster*, with an oral argument by *Mr. Bowerman*.

For respondent there was a brief with oral arguments by *Mr. Loyal H. McCarthy* and *Mr. J. Le Roy Smith*.

HARRIS, J.—When Rushing bought the store with its stock of hardware he did not receive or demand from the seller a written statement under oath, containing the names and addresses of the creditors, or a statement showing the indebtedness due or to become due from the seller. Some of the merchant creditors had actual notice and assisted in invoicing the stock of

goods; and it may fairly be inferred that nearly all, if not all, the merchant creditors acquired a knowledge of what Rushing and Hartwig were doing before the invoice was completed and the stock transferred to Rushing.

It is proper to note also that after Rushing paid \$4,367.34 to the merchant creditors of George Hartwig and after the latter turned over to his creditors the \$1,500 collected by him, his remaining indebtedness consisted of the Miller note, the note to his brother, and only three or four hundred dollars presumably due merchant creditors.

It is not necessary to enumerate in detail all the obstacles which contributed towards delaying the commencement of this suit, but it is enough to say that we approve the finding of the trial court that the plaintiff "has acted promptly."

George Hartwig is insolvent and has no money or other property.

Johnie Gertrude Rushing knew as early as the latter part of August, 1911, that her husband "was expecting or was thinking of making the deal with Mr. George Hartwig." When asked "In the business transactions of your husband that he had not only with this man but with others, were they talked over between you, these business affairs?" she answered, "Very thoroughly Mr. Rushing went through them." She stated also that her husband was "very confidential with" her "in reference to his business affairs," and that she was "at Aurora and was around the store a great deal when the inventory was being taken."

It was contended throughout the trial that Johnie Gertrude Rushing loaned \$5,000 to her husband before he came to Oregon and that the Cherrydale lots were

conveyed to her in satisfaction of that indebtedness. A careful reading of the whole record convinces us, however, that the trial judge who saw and heard the witnesses, correctly found that "no consideration was paid for" the Cherrydale lots by Johnie Gertrude Rushing or for the Overlook lot by Maxine C. Rushing "and that the conveyances to them were voluntary conveyances" and that Johnie Gertrude Rushing had full knowledge of all the facts surrounding the purchase of the Hartwig store.

The bulk sales law, as originally enacted in 1899, consisted of four sections and was a counterpart of a number of the bulk sales statutes which at about that time were passed by the legislatures of many of the states. Our statute was amended in 1901 and in 1905 and, as amended, was carried into the Code as Sections 6069 to 6072, L. O. L., inclusive. The act was again amended by Chapter 281, Laws of 1913; but in 1911, when George Hartwig sold the hardware store to C. C. Rushing, Sections 6069 and 6070, L. O. L., which are especially pertinent here, read as follows:

"Section 6069. It shall be the duty of every person who shall bargain for or purchase any stock of goods, wares, or merchandise in bulk, for cash or on credit, to demand and receive from the vendor thereof, and if the vendor be a corporation then from a managing officer or agent thereof, at least five days before the consummation of such bargain or purchase, and at least five days before paying or delivering to the vendor any part of the purchase price or consideration therefor, or any promissory note or other evidence of indebtedness therefor, a written statement under oath containing the names and addresses of all of the creditors of said vendor, together with the amount of indebtedness due or owing, or to become due or owing, by said vendor to each of such creditors,

and if there be no such creditors, a written statement under oath to that effect; and it shall be the duty of such vendor to furnish such statement at least five days before any sale or transfer by him of any stock of goods, wares, or merchandise in bulk.

"Section 6070. After having received from the vendor the written statement under oath mentioned in Section 6069 the vendee shall, at least five days before the consummation of such bargain or purchase, and at least five days before paying or delivering to the vendor any part of the purchase price or consideration therefor, or any promissory note or other evidence of indebtedness for the same, in good faith notify or cause to be notified, personally or by wire or by registered letter, each of the creditors of the vendor named in said statement, of the proposed purchase by him of such stock of goods, wares, or merchandise; and whenever any person shall purchase any stock of goods, wares, or merchandise in bulk, or shall pay the purchase price or any part thereof, or execute or deliver to the vendor thereof or to his order, or to any person for his use, any promissory note or other evidence of indebtedness for said stock, or any part thereof, without having first demanded and received from his vendor the statement under oath as provided in Section 6069, and without having also notified or caused to be notified all of the creditors of the vendor named in such statement, as in this section prescribed, such purchase, sale, or transfer shall, as to any and all creditors of the vendor, be conclusively presumed fraudulent and void."

1. It is contended that the statute only applies to a "sale" as distinguished from a "barter or exchange" of personal property and that the bulk sales law applies only to transfers "for cash or on credit"; that the transfer of the store to Rushing was not a sale "for cash or on credit"; and that therefore the transaction was not in violation of the bulk sales law.

2. In legal nomenclature the term "sale" is used in a restricted and also in a broad sense. The controversy presented by this appeal does not require an attempt to determine whether the word "sale" when technically and exactly defined is confined to the restricted sense or comprehends the broad meaning. When employed in its restricted sense it means a transfer of title for money: *Huthmacher v. Harris' Admrs.*, 38 Pa. St. 491 (80 Am. Dec. 502). There are numerous transactions where the word "sale" must, because of the very nature of the business, be given its restricted meaning, as, for example, powers of attorney and the like: *Coulter v. Portland Trust Co.*, 20 Or. 469, 481 (26 Pac. 565, 27 Pac. 266); *Colgan v. Farmers & Mechanics' Bank*, 59 Or. 469, 480 (106 Pac. 1134, 114 Pac. 460, 117 Pac. 807); *Mora v. Murphy*, 83 Cal. 12 (23 Pac. 63). When used in its broad sense the term "sale" includes the transfer of personal property for a consideration estimated in money. There are many authorities which define a sale of personal property as the transfer of a chattel from the seller to the buyer for a price, or a consideration estimated in money; and consequently under that definition if property is taken at a fixed money price, the transfer is a sale whether the fixed money price is paid in cash or in goods. A barter or exchange of properties occurs where one article is exchanged for another, no price in money being fixed upon either: 35 Cyc. 25, 40; 17 Cyc. 830; 1 Mechem on Sales, §§ 1 and 13; 23 R. C. L. 1185, 1186; *Picard v. McCormick*, 11 Mich. 68; *Huff v. Hall*, 56 Mich. 456 (23 N. W. 88); *Fuller v. Duren*, 36 Ala. 73 (76 Am. Dec. 318); *Thornton v. Moody* (Tex. Civ. App.), (24 S. W. 331); *Jordon v. Dyer*, 34 Vt. 104 (80 Am. Dec. 668); *Loomis v. Wainwright*, 21 Vt. 520;

Borland v. Nevada Bank, 99 Cal. 89 (33 Pac. 737, 37 Am. St. Rep. 32).

The word "sale" is sometimes used in what may be termed its popular sense, and when so used signifies the transfer of property from one person to another for a consideration of value, without reference to the particular mode in which the consideration is paid; and as stated in *Gallus v. Elmer*, 193 Mass. 106, 109 (78 N. E. 772, 8 Ann. Cas. 1067), in the interpretation of statutes the word "sale" is often given its popular signification and "held to include barter and any transfer of personal property for a valuable consideration": *Howard v. Harris*, 8 Allen (Mass.), 297; *James v. State*, 124 Ga. 72 (52 S. E. 295); *Howell v. State*, 124 Ga. 698 (52 S. E. 649); *Commonwealth v. Clark*, 14 Gray (Mass.), 367, 372. See Webster's Dictionary.

3. Ordinarily the word "cash" means money and yet it has been held that "in sales" it "is frequently used as a term meaning the opposite of credit": *Lee v. Cutrer*, 96 Miss. 355, 366 (51 South. 808, Ann. Cas. 1912B, 478, 27 L. R. A. (N. S.) 315).

When examining this statute we must read it in its entirety and construe the words found in it in the light of the manifest intent of the legislature; and when all the language of the act is so read and considered it becomes plain that the lawmakers did not intend that the statute should be limited to a "sale" for "cash or on credit." The enactment opens by declaring that it shall be the duty of every person who shall "bargain for or purchase." The words "bargain for or purchase," and especially the word "purchase," are terms of broad signification. If the statute contained no other words than "for cash or on credit," then that

language would probably limit what precedes it and it would quite likely be necessary to hold that the act applied only to a "bargain" or "purchase" made "for cash or on credit"; but the statute does contain other words, some of which are coextensive in meaning with the words "sale" and "cash" while others are more comprehensive. In Section 6069 we read that the purchaser must demand and receive a written statement "before paying or delivering to the vendor *any part of the purchase price or consideration therefor*, or any promissory note or other evidence of indebtedness therefor." The same language, last quoted, appears a second time in Section 6070. It will be observed that the disjunctive conjunction "or" is employed; that not only the word "paying" but also the word "delivering" is used; and that in addition to the words "purchase price" the word "consideration" is employed. It is true that the language which has been quoted from Sections 6069 and 6070 is stated a third time in Section 6070 and in the third statement of it the word "consideration" is omitted. The words "purchase price," however, appear in each of the three statements and those words, if they stood alone, would be sufficient to include sales for the equivalent of money as well as sales for money: 31 Cyc. 1171; 32 Cyc. 1264; and when to the words "purchase price" is added the word "consideration," and these words are always stated disjunctively, it becomes apparent that the legislative mind intended the statute to apply not only to transactions involving the "paying" of "money" or the "delivering" of notes or other evidence of indebtedness but also to the "delivering" of such "consideration" as is the equivalent of money. This conclusion is further supported by other language

found in three of the four sections of the enactment; for nowhere in the enactment is the word "sale" found alone, but in every instance it appears in company with the word "transfer" and the two words are invariably stated in the alternative because the language is always thus: "Sale or transfer." Moreover, in Section 6072, L. O. L., we read: "Sold or conveyed." While there is judicial authority for holding that the language of the statute is sufficiently appropriate to include a pure barter, still we prefer to postpone the decision of that question until a case is presented requiring an adjudication of that question. However, we have no hesitancy in declaring that the statute applies not only to sales for money but also to sales for property measured in money or, in the words of the books, for the equivalent of money or money's worth. The stock of goods was invoiced at a fixed price in money; the furniture was measured in terms of money; and the prune orchard was valued in dollars. A price in money was placed upon every article of property involved in the transaction; and hence the bulk sales law applied to the transfer of the stock of hardware.

4. It is next argued that the bulk sales law protects none but mercantile creditors. Sections 6069 and 6070 speak of "all of the creditors"; Section 6071 refers to "all of his creditors"; and Section 6070 emphasizes the requirements of the statute by declaring that a "purchase, sale, or transfer" made without compliance with the act shall be conclusively presumed fraudulent and void as to "any and all creditors." These words, to which attention has been directed, are plain, unequivocal and unambiguous. They construe themselves. They comprehend all creditors. No distinction is made between classes of creditors: *Galbraith v.*

Oklahoma State Bank, 36 Okl. 807 (130 Pac. 541); *People's Savings Bank v. Van Allsburg*, 165 Mich. 524 (131 N. W. 101); *Eklund v. Hopkins*, 36 Wash. 179 (78 Pac. 787); *Joplin Supply Co. v. Smith*, 182 Mo. 212 (167 S. W. 649, 654). Indeed, in one jurisdiction it has been held that a statute is unconstitutional if it attempts to protect mercantile creditors only: *McKinstler v. Sager*, 163 Ind. 671 (72 N. E. 854, 106 Am. St. Rep. 268, 68 L. R. A. 273).

5. The appellants argue that William H. Hartwig was not entitled to notice, for the reason that the note did not become due until five years after date. This argument is completely answered by the plainest kind of language appearing in the statute itself; for it is said in Section 6069, L. O. L., that the written statement must show the amount of the indebtedness due or owing, or "to become due or owing." The statute is in favor of all creditors and includes those whose demands are not yet due as well as those whose demands are overdue: *Hillsboro National Bank v. Garbarino*, 82 Or. 405, 411 (161 Pac. 703); *Calkins v. Howard*, 2 Cal. App. 233 (83 Pac. 280); 12 R. C. L. 492.

6. The appellants insist with much vigor that the plaintiff is not entitled to the relief sought by him, even though it be decided that he was a creditor within the meaning of the statute. Section 6070, L. O. L., provides that any "purchase, sale, or transfer" made without observing the requirements of the bulk sales law shall, as to any and all creditors of the seller, "be conclusively presumed fraudulent and void." Failure to comply with the statute results in a conclusive presumption of fraud; and the effect of this conclusive presumption is not only to relieve the creditor from the necessity of proving actual fraud but also to preclude the buyer from gainsaying the presumption:

Goodwin v. Tuttle, 70 Or. 424, 432 (141 Pac. 1120); *Galbraith v. Oklahoma State Bank*, 36 Okl. 807 (130 Pac. 541); *Calkins v. Howard*, 2 Cal. App. 233 (83 Pac. 280); *Joplin Supply Co. v. Smith*, 182 Mo. App. 212 (167 S. W. 649, 654); *Glantz v. Gardiner*, 40 R. I. 297 (100 Atl. 913, L. R. A. 1917F, 226, 228). When a transfer of property is fraudulent as to the creditors of the seller certain remedies are available to the creditors and those remedies are made available because of the fraud. If fraud is the element which determines the right of the creditor to a remedy then on principle the same remedy which would afford relief against actual or common-law fraud should be equally available for relief against conclusively presumed or statutory fraud. It is true that moral turpitude is present in one instance and is absent in the other and yet fraud is present in each instance; and it is the presence of this fraud that confers the right to relief and, as was said in *Rothchild Bros. v. Trewella*, 36 Wash. 679 (79 Pac. 480, 104 Am. St. Rep. 973, 68 L. R. A. 281).

“We can discover no logical distinction between the different classes of conveyances which the common and statutory laws declare fraudulent. The remedy afforded an injured creditor must, upon principle, be the same in all cases, unless the legislature has provided a different remedy.”

If a transfer is fraudulent it makes no difference whether it is common law or statutory fraud; for in either event the general rule is that the creditor who has not reduced his claim to a judgment against the seller and debtor or has not obtained a lien cannot sue the purchaser directly, as on a personal liability: *Rothchild Bros. v. Trewella*, 36 Wash. 679 (79 Pac. 480, 104 Am. St. Rep. 973, 68 L. R. A. 281); *Morton v. Denham*,

39 Or. 227, 240 (64 Pac. 384); *Rogers' Milling Co. v. Goff etc. Co.*, 46 Okl. 339 (148 Pac. 1029); *Bewley v. Sims* (Tex. Civ. App.), (145 S. W. 1076); *Goodwin v. Tuttle*, 70 Or. 424, 430 (141 Pac. 1120); *Joplin Supply Co. v. Smith*, 182 Mo. App. 212 (167 S. W. 649, 654); 12 R. C. L. 645. However, *Daly v. Sumpter Drug Co.*, 127 Tenn. 412 (153 S. W. 167, Ann. Cas. 1914B, 1101), seems to furnish authority for an exception to this general rule if the purchaser has disposed of the goods or so intermingled them with other property as to render them indistinguishable.

If the fraudulent grantee still has in his possession the identical property which was transferred from the debtor, not much difficulty is encountered by the creditor; for he may if he wishes sue the debtor and attach the stock of goods in the hands of the fraudulent purchaser on the theory that as between the purchaser and the creditor the property still belongs to the debtor: *Bank of Colfax v. Richardson*, 34 Or. 518, 540 (54 Pac. 359, 75 Am. St. Rep. 664); 20 Cyc. 656, 661. This rule finds frequent illustration not only in cases of common-law fraud but also in cases of statutory fraud resulting from a failure to observe bulk sales laws: *Oregon Mill & Grain Co. v. Hyde*, 87 Or. 163, 170 (169 Pac. 791); *Owosso Carriage & Sleigh Co. v. McIntosh & Warren*, 107 Tex. 307 (179 S. W. 257, L. R. A. 1916B, 970); *Jaques & Tinsley Co. v. Carstarphen Co.*, 131 Ga. 1 (62 S. E. 82); *Moultrie Grocery Co. v. Holmes-Hartsfield Co.* (Ga. App.), (96 S. E. 346); *Coffey v. McGahey*, 181 Mich. 226 (148 N. W. 356, Ann. Cas. 1916C, 923). In many jurisdictions a common-law fraudulent transferee may be held to the liability of a garnishee or trustee on account of the property so conveyed, or the proceeds if he has disposed of the same: 20 Cyc. 663; *Sabin v. Michell*, 27 Or. 66 (39

Pac. 635). Difficulties at once arise, however, when it is ascertained that the fraudulent grantee has disposed of the property which was transferred from the debtor. Although in cases of common-law fraud a creditor who has reduced his claim to judgment usually can avail himself of some sort of remedy, the adjudications do not entirely agree upon the procedure to be followed by the creditor: 12 R. C. L. 646; 20 Cyc. 262.

As between the creditor and the purchaser the transfer of a stock of goods in bulk is fraudulent and void; the goods are treated as the property of the debtor; and therefore the goods are regarded as a trust fund in the hands of the purchaser and he is viewed as a trustee for the benefit of the creditors. If the purchaser disposes of that trust fund, then it is entirely logical to say that he holds the proceeds as a trust fund and that the creditors may reach those proceeds to the same extent that they could have reached the fund before a change in its form was effected. The following authorities give support to this rule: *Fitz Henry v. Munter*, 33 Wash. 629, 634 (74 Pac. 1003); *Kohn v. Fishback*, 36 Wash. 69 (78 Pac. 199, 104 Am. St. Rep. 941, L. R. A. 1917F, 234); *In re Gaskill* (D. C.), 130 Fed. 235, 236; *In re Connor* (D. C.), 146 Fed. 998; *Jaques & Tinsley Co. v. Carstarphen Co.*, 131 Ga. 1 (62 S. E. 82); *Moultrie Grocery Co. v. Holmes-Hartsfield Co.* (Ga. App.) (96 S. E. 346); *Coffey v. McGahey*, 181 Mich. 225 (148 N. W. 356, Ann. Cas. 1916C, 923, 925); *Flechheimer-Keiffer Co. v. Burton*, 128 Tenn. 682 (164 S. W. 1179, 51 L. R. A. (N. S.) 343, 345); *Oregon Mill & Grain Co. v. Hyde*, 87 Or. 163, 170 (169 Pac. 791).

William H. Hartwig reduced his claim to a judgment before he began this suit and that fact plus the fact

that George Hartwig is insolvent and utterly without assets entitled William H. Hartwig to avail himself of an equitable remedy: *Fleischner v. First Nat. Bank*, 36 Or. 553, 563 (54 Pac. 884, 60 Pac. 603, 61 Pac. 345); *Bowman v. Sherrill*, 59 Or. 603, 604 (117 Pac. 1122).

Johnie Gertrude Rushing took title to the three lots in Cherrydale Addition with knowledge of the circumstances surrounding the transfer of the hardware store; the conveyance to Johnie Gertrude Rushing and the transfer to the daughter Maxine C. Rushing were voluntary conveyances without consideration; and, therefore, each of those grantees stands in the shoes of C. C. Rushing: *Porter v. O'Donovan*, 65 Or. 1, 10 (130 Pac. 393); 20 Cyc. 627; 646, 650.

The three lots in Cherrydale Addition and the one lot in Overlook Addition are the equivalent of the hardware store. The stock of goods was transmuted into land consisting of the four lots. The record title to those lots was never in the name of C. C. Rushing although the paper title is now in the name of persons standing in the shoes of C. C. Rushing and in these circumstances the plaintiff was clearly entitled to resort to a suit in equity: 20 Cyc. 676; *Jimmerson v. Duncan*, 48 N. C. 537; *Wright v. Douglass*, 3 Barb. (N. Y.) 554; *Maynard v. Hoskins*, 9 Mich. 485; *Webster v. Folsom*, 58 Me. 230.

Additional problems would be presented for solution if the purchase price had been less than the total indebtedness of George Hartwig; but none of the questions which might arise out of that and kindred situations are involved here.

The decree appealed from is affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON and BURNETT, JJ.,
concur.

Submitted on briefs June 6, affirmed July 1, 1919.

REHFUSS v. WEEKS.*

(182 Pac. 137.)

Pleading—Election Between Defenses—Necessity.

1. A defendant can be required to elect upon which of several defenses he will rely only where the facts stated as such defenses are so inconsistent that, if the truth of one defense be admitted, it would necessarily destroy the other.

Pleading—Election Between Defenses—Inconsistent Statements.

2. In an action for damages for distributing water on plaintiff's land by a drainage ditch, no election was required where defendant pleaded a natural outlet and also that such natural outlet was changed and lowered by the construction of the ditch acquiesced in for more than 20 years.

Trial—Instructions—Requests.

3. In an action for damages to land by distribution of water through a drainage ditch, a requested instruction that water cannot be discharged on the property of another without his consent and to his injury in greater quantities than that in which it would naturally flow, *held* covered by other instructions given.

Waters and Watercourses—Drainage—Action for Damages—Instructions.

4. In an action for damages to land by distribution of water through a drainage ditch, an instruction as to changing a natural watercourse and restoring the same to its original channel within the confines of defendant's own land *held* properly refused as inapplicable to the issues.

Waters and Watercourses—Diversion or Change of Natural Streams—Liability.

5. When a small natural stream is straightened and deepened so as to confine the waters thereof within a smaller compass, thereby increasing the tillable land, in such a manner as not to increase the amount of water, or change the place of discharge on a neighbor's land, no cause of action arises.

Waters and Watercourses—Action for Injuries—Instructions—Surface Water.

6. In an action for damages to land by distribution of water from a drainage ditch, an instruction that, if defendant cast water from his property permeating the surrounding soil and percolating into

*Authorities passing on the question of right of riparian owner to restore stream which has changed its course by natural causes to old channel are collated in notes in 33 L. R. A. (N. S.) 804; L. R. A. 1916F, 407.

plaintiff's land to his injury, verdict should be for plaintiff, was properly refused as ignoring the rule as to surface water.

[As to instances of percolating waters, see note in 67 *Am. St. Rep.* 671.]

Waters and Watercourses—Surface Water—Drainage.

7. The owner of upper lands is not prohibited by the rule as to surface water from cultivating his lands or draining them by artificial ditches, though surface water is thereby precipitated more rapidly upon the lands of the adjacent owner below, provided he does not cause water to flow on such lands, which, but for the artificial ditches, would have flowed in a different direction, and provided he acts with a prudent regard for the adjacent owner's interest.

From Marion: PERCY R. KELLY, Judge.

In Banc.

Plaintiff brought this action to recover damages in the sum of \$475 of defendant for distributing water on plaintiff's land by means of a drainage ditch and tiling. The cause was tried before the court and a jury resulting in a verdict for defendant. From the consequent judgment plaintiff appeals.

After describing the premises of plaintiff and those of defendant, plaintiff asserted in his initiatory pleading in substance: That from time immemorial there has been a natural basin about 800 feet in length and 250 to 300 feet in width on the property of defendant. During the rainy seasons of the year such basin fills with water; that prior to January 4, 1913, the defendant constructed a ditch varying from a few inches to nine feet six inches in depth, and has ever since maintained a drainage tile therein, across a portion of his land and the property adjoining him on the north; the ditch extending to and across a county road for the purpose of draining such basin, and that the waters which accumulate in said basin pass through this tile, and are emptied on the surface of the ground at the "drainage outlet" near the west line of plaintiff's property causing an excess of water upon plaintiff's

land, which lies between the drainage outlet and Claggett Creek, the only outlet for the water which flows through the drainage tile over plaintiff's land thereby damaging plaintiff's land and orchard.

Defendant by his answer denies the alleged trespass and asserts that the physical configuration of said basin and surrounding country is such that the basin drains its water in a natural course through a natural depression over the land intervening between plaintiff and defendant, crossing the public thoroughfare twice and then across the land of plaintiff until such drainage empties into Claggett Creek; that in addition to the natural depression in the earth's surface extending from the basin to the creek, a ditch from one to six feet deep was constructed in ancient times for the purpose of more expeditiously draining such basin, and a large portion of country through its accustomed outlet; that in 1911, in order to hasten the drainage of the basin, defendant lowered the depth of the ditch on an average of about two feet across a portion of his land and the adjoining premises of one Kurtz, which would not increase the accumulation of water in the basin, nor alter the accustomed manner in which the basin drained its waters, nor increase the amount of water which passed over plaintiff's land by reason of the drainage from said basin or surrounding country; that for a period of more than twenty years the predecessors in interest and estate of plaintiff have acquiesced in the course the drainage of said basin has taken, and the artificial ditch dug to facilitate the drainage thereof; that plaintiff's lands are considerably lower than the bed of the basin, and in the state of nature was and is now by an artificial ditch and tile drain over said accustomed route, subject to the drain of the land lying above plaintiff's premises and said

natural basin; and, a portion of plaintiff's land is marshy and wet during a considerable part of the year on account of percolating waters draining from higher lands immediately to the south.

Defendant also pleaded that plaintiff in disregard of the proprietary rights of the defendant obstructed the natural drain of the water flowing from the basin on the lands of defendant so that the same was held back upon defendant's land to his damage in the sum of \$250. At the opening of the trial, plaintiff submitted to the court a motion "to require the defendant to elect as to which defense and by way of counterclaim he will rely upon, to wit, a right by nature as pleaded in * * defendant's further and separate answer, or a right by prescription," as pleaded therein.

The denial of such motion is assigned as error.

AFFIRMED.

For appellant there was a brief submitted by *Mr. F. H. Reeves*.

For respondent there was a brief prepared and submitted by *Messrs. McNary & McNary, Mr. E. M. Page and Mr. Grant Corby*.

BEAN, J.—1. A defendant can be required to elect on which of several defenses he will rely only where the facts stated as such defenses are so inconsistent that if the truth of one defense be admitted, it will necessarily disprove the other: *Snodgrass v. Andross*, 19 Or. 236 (23 Pac. 969); *Farmers' National Bank v. Hunter*, 35 Or. 188 (57 Pac. 424); *Fleishman v. Meyer*, 46 Or. 267 (80 Pac. 209); *Susznik v. Alger Logging Co.*, 76 Or. 189 (147 Pac. 922, Ann. Cas. 1917C, 700).

This rule of law is well settled in this state and it only remains to apply it. It will be noticed that the defendant pleaded in effect that from time immemorial there existed a natural outlet to the basin referred to, and that in ancient times a ditch was constructed along the natural depression which served as a drain for a large portion of country lying on either side thereof; that the predecessors in interest of plaintiff have acquiesced in the manner of so draining the surrounding lands for more than twenty years.

2. It might be true that there was such a natural outlet of the basin in question. It might also be true that the natural depression or outlet was changed and lowered by the construction of the ditch as alleged; therefore, it does not follow that if one state of facts pleaded by defendant is true, the other is false. We see no inconsistency in the two statements. The ruling of the trial court denying the motion to elect was correct.

Testimony was introduced upon the respective sides tending in a measure, at least, to support the contention of the respective parties. At the close of the evidence, plaintiff requested the court to instruct the jury as follows:

"It is a rule of law that water cannot be discharged by one person upon the property of another, without his consent and to his injury by artificial means, in greater quantities than that in which it would naturally flow. Therefore, if you should find that the defendant therein has, by artificial means, increased the flow of water over that which would naturally flow over the property of the plaintiff, to his injury and without his consent, you should find for the plaintiff."

The plaintiff complains of the refusal of the trial court to so charge the jury. The trial court plainly

and in detail stated the issues to the jury, and instructed them to determine whether or not the course in which the waters were directed by defendant was a natural course, and charged in substance as follows:

"The position of the defendant is that there was a natural watercourse over the property in question through which the drainage which is shown to have taken place was caused to flow; and it is the law, gentlemen of the jury, that one upon whose property there is such a basin containing water of this character may drain the same through a natural watercourse, if one is there, and may, in the course of the drainage, reasonably increase or accelerate the flow of the watercourse, but cannot rightfully increase the quantity or amount of the water within the natural basin in making the drainage.

"One may not by artificial means collect water upon his property and discharge it upon the property of another to his injury; nor may one by artificial means other than through a natural watercourse cause water to flow out and upon the lands of another to the other's injury; and if you find from a consideration and comparison of the evidence in the case, that there was not a natural watercourse over this property in which the water has been caused to flow by the defendant, and you find that the flowage of water thus caused by the defendant to have been the cause of damage, * * to the plaintiff, as alleged in the complaint, your verdict should be for the plaintiff.

"You are instructed that defendant, in leveling or improving his property, had a legal right to cause an accumulation or diversion of surface water with the corresponding right to cause said water to flow down on the land of plaintiff, without liability, providing that the surface water collected in the basin on defendant's real property followed the way or course provided by nature and any increase in the flowage of such way or course provided by nature, if such increase has been shown, was a reasonable increase."

Over the objection and exception of plaintiff, the court in effect charged the jury that, as a matter of law, defendant Weeks had a right to expel surface waters which naturally accumulated on his premises, upon the land of an adjoining proprietor without subjecting himself to liability, but in no case can a land owner collect the surplus waters upon his lands into a basin by artificial methods and then discharge the water through a ditch upon the lands of another unless such lands form the natural drainage of such waters.

3. It seems that the requested instruction was thoroughly covered and explained by the charge as given by the court to the jury, and that the case was properly submitted to the jury; therefore, the plaintiff has no reason to complain in this respect.

4. Plaintiff requested the court to charge the jury as to the law relating to the defendant's changing the natural course of the water from one place to another and restoring the same to its original channel within the confines of his own land, and assigns error of the court in refusing to instruct so. We find no issue raised in the case to which such an instruction would apply. The plaintiff complains of the defendant's digging a ditch and thereby causing water to flow to a place from which it will percolate or flow to his land. He makes no complaint of changing the course of a natural stream. There was no error in refusing the request. The charge to the jury taken as a whole, we think is correct. It is entirely fair to plaintiff.

5. It is a matter of common knowledge that small natural streams are straightened and deepened so as to confine the waters thereof within a smaller compass, thereby increasing the tillable land. When this is

done in a manner so as not to increase the amount, or change the place of the discharge of such water on to a neighbor's land, that neighbor has no cause for complaint.

6. Plaintiff also requested the court to instruct that—

If they found "that the defendant did cast water from his property which did permeate the surrounding soil and percolate through the same into and permanently injuring the land of the plaintiff, you should find for the plaintiff."

7. The requested instruction ignores the rule as to surface water. A portion of the water in question appears to come within such designation. The defendant as a land owner, had the right to turn or expel upon the land of an adjacent owner, surface water that would naturally flow there, and in such quantities as would naturally drain in such direction, without liability for damages: *Whitney v. Willamette Ry. Co.*, 23 Or. 188 (31 Pac. 472); *Davis v. Fry*, 14 Okl. 340 (78 Pac. 180, 2 Ann. Cas. 193, 69 L. R. A. 460); 5 M. A. L., § 469, p. 354. The owner of upper lands is not prohibited by the rule from cultivating his lands or draining them by artificial ditches, though surface water is thereby precipitated more rapidly upon the lands of the adjacent owner below, provided he does not cause water to flow on such lands which, but for the artificial ditches, would have flowed in a different direction, and provided he acts with a prudent regard for the interests of such adjacent owner: 30 Am. & Eng. Enc. of Law (2 ed.), 337; Angell on Watercourses (6 ed.), p. 122 et seq.; *Anderson v. Henderson*, 124 Ill. 164, 170 (16 N. E. 232); *Wood v. Moulton*, 146 Cal. 317 (80 Pac. 92); *Shaw v. Ward*, 131 Wis. 646 (111 N. W. 671, 11

Ann. Cas. 1139). In the latter report the syllabus is as follows:

"A land owner has the right to protect his premises from surface waters by causing the same to flow by the natural and necessary course to adjoining lands, subject to the limitation that he cannot rightfully collect surface waters on his premises in a reservoir and then discharge the same on to the land of another to his injury.

"A person on whose land surface water coming from his own and other lands collects in a natural basin or depression and there remains except in seasons of drought, has the legal right to rid his land of the water by causing the same, by such means as may be reasonably necessary, to flow in the natural course of drainage on to adjoining lands, though the water may from thence, by natural or artificial means for which he is not responsible, reach and spread out over the lands of others. In such a case the land owner effecting the drainage of his land by means of a ditch is only in the exercise of the right of every person to defend his premises against surface water, and for consequential damages to other land owners the latter have no remedy against the former."

Plaintiff complains of instructions in regard to the defendant's counterclaim for damages. In view of the fact that no damages were awarded the defendant, it is unnecessary to consider this question. Other errors are assigned which we have examined and find to be without merit.

The question involved in this case was largely one of fact. It was carefully and plainly submitted to the jury by the trial court according to the principles of law. Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED.

Argued June 17, writ allowed July 1, 1919.

STATE EX REL. v. HURLBURT.

(182 Pac. 169.)

Mortgages—Redemption—Retroactive Statute.

1. A state statute, which authorizes the redemption of property sold on foreclosure of a mortgage where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.

Constitutional Law—Impairment of Contract Right—Redemption of Mortgage.

2. Laws of 1917, page 736, amending Section 248, L. O. L., relating to redemption from mortgage sales, is inapplicable to mortgages executed prior to enactment thereof, in so far as it gives mortgagor who has sold property right to redeem, and in so far as it extends period of redemption from one year to one year and ten days, for to apply amendment to such mortgagor would impair contract rights.

[As to laws relating to redemption, see note in 120 Am. St. Rep. 479.]

Courts—Rules of Decision—United States Supreme Court.

3. The state Supreme Court will accept decision of United States Supreme Court upon a question arising under the Constitution of the United States, though logic of the opinion seem questionable to state court.

Names—Idem Sonans.

4. Mortgage foreclosure complaint and decree of sale, describing property as in "Blackistone Addition," was not fatally defective, though mortgage described property as in "Blackstone addition"; "Blackistone" and "Blackstone" being idem sonans.

Original proceedings in *mandamus* in Supreme Court.

In Banc.

This is an original proceeding by *mandamus*, to compel the defendant, who is sheriff of Multnomah County, to execute in favor of plaintiff a sheriff's deed to certain property sold by him to plaintiff's predecessor in interest. The facts are as follows:

On May 15, 1916, Melvin A. Smith executed a mortgage in favor of Augusta Rosin, covering a tract of

land in Blackistone Addition to Portland, to secure the payment of \$2,000, due in three years, with interest at eight per cent, payable quarterly, which mortgage was recorded May 18, 1916.

On January 21, 1918, default having been made in the terms of the mortgage, Augusta Rosin instituted a foreclosure proceeding in the Circuit Court of Multnomah County against Melvin A. Smith and Eva M. Duggan, Smith having conveyed the land to Eva M. Duggan March 8, 1917, subject to the above-mentioned mortgage, said deed being recorded April 2, 1917.

On April 5, 1918, judgment was rendered in favor of plaintiff Augusta Rosin against Smith for \$2,000, with interest at eight per cent from February 28, 1917, and the further sum of \$125 as attorney's fees, and costs and disbursements in the amount of \$25.80, and on April 11, 1918, execution issued under which the sheriff sold the above-described property to Augusta Rosin for \$2,000, leaving in favor of Augusta Rosin a deficiency judgment which was subsequently satisfied by levying against additional property of Smith.

On May 25, 1918, said sale was confirmed, the order instructing and authorizing the sheriff to make and deliver to Augusta Rosin, or her successors, heirs or assigns, a deed of conveyance, conveying the above described real property to her, or her successors, heirs or assigns, after the expiration of one year from date thereof.

Subsequent to the institution of the above foreclosure proceeding, Eva M. Duggan and her husband conveyed the above-described property to C. H. Van Allen, the deed being dated March 25, 1918, and recorded May 18, 1918.

On April 17, 1919, Van Allen and wife conveyed all their interest in said property to Akerson, Gooch

& Co., Inc., relator herein. This deed was recorded April 17, 1919.

On April 30, 1919, Augusta Rosin and her husband conveyed all their right, title and interest in said property to the said Akerson, Gooch & Co., Inc., which deed was recorded May 2, 1919, and on May 1, 1919, assigned, set over and transferred all her right, title and interest in the sheriff's certificate of sale issued by the sheriff in the above foreclosure, which certificate of sale was recorded May 22, 1919.

On May 27, 1919, the relator herein presented said certificate of sale to the sheriff of Multnomah County, and demanded the execution and delivery of a deed, more than one year having elapsed since the confirmation of said sale, and no redemption having been made. Prior or subsequent thereto, the above-mentioned Melvin A. Smith served a notice on the relator and on the sheriff of Multnomah County, notifying said persons that he would apply to the sheriff of Multnomah County for a certificate of redemption from the above-mentioned sale on the third day of June, 1919.

On May 27, 1919, at the time demand was made for the delivery of the deed by the sheriff to the relator, the sheriff refused to execute said deed, in view of the above notice.

At the time the mortgage on which the above foreclosure proceeding was based was executed, to wit: May 15, 1916, a judgment debtor could, at any time prior to the confirmation of such sale, and also within one year after confirmation of said sale, redeem the property, paying the amount of the purchase money, with interest thereon at the rate of 10 per cent per annum from date of sale, together with the amount of any taxes the purchaser may have been required to pay thereon: Section 248, L. O. L.

On May 21, 1917, Section 248, L. O. L., was amended, as concerns the period of redemption, in that a judgment debtor, who had either before or after sale transferred his interests in the property foreclosed, should be precluded from the right to redeem, unless the proceeds from the sale of said property was insufficient to satisfy the judgment, in which event the judgment debtor should have the right to redeem from said sale at any time within ten days after the year allowed by Section 248 for redemption, and not otherwise: Laws 1917, Chap. 352, p. 736.

Plaintiff prosecutes this proceeding, claiming that Section 248, L. O. L., as amended by Chapter 352, 1917 Laws, is unconstitutional and void as applied to judicial sales on mortgages executed prior to the passage of said act, for the reason that it extends the time, within which the judgment debtor is permitted to redeem, to a period beyond that prescribed by the statute in force when the mortgage was executed.

WRIT ALLOWED.

For plaintiff there was a brief over the name of *Messrs. Ridgway & Johnson*, with an oral argument by *Mr. Albert B. Ridgway*.

For defendant there was a brief and an oral argument by *Mr. John K. Kollock*.

McBRIDE, C. J.—It requires no argument to demonstrate the proposition that by virtue of the conveyances from Eva Duggan to Van Allen, and from Van Allen to plaintiff, it succeeded to all the rights of Mrs. Rosin, the mortgagee and purchaser at the foreclosure sale, and that if the statute of 1917, extending the time

for redemption, would be void as to her it would also be void as to plaintiff.

1. It is settled by the case of *Barnitz v. Beverly*, 163 U. S. 118 (41 L. Ed. 93, 16 Sup. Ct. 1042), that, to use the language of the syllabus,—

“A state statute, which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.”

2. Prior to the passage of the amendment of 1917 the mortgagor, if he had not parted with his title to the property, had one year within which to redeem. This was the situation when the mortgage in question was executed. By the terms of the act of 1917 it was provided that, upon the happening of a certain contingency, namely: The failure of the property to bring the amount of the mortgage when sold, the judgment debtor should be permitted to redeem and he should, after the expiration of one year, have ten days' additional time within which to make such redemption. This constitutes a clear extension of the time for redemption from one year to one year and ten days, and also gives the mortgagor a right of redemption where no such right existed before. In our judgment, such extension cannot apply to a mortgage executed before the last named statute was enacted.

The case of *Hooker v. Burr*, 194 U. S. 415 (48 L. Ed. 1046, 24 Sup. Ct. Rep. 706), is relied upon by counsel for defendant as modifying, in some degree, the rule laid down in *Barnitz v. Beverly*, 163 U. S. 118 (41 L. Ed. 93, 16 Sup. Ct. Rep. 1042), but we do not see

that it in any way sustains defendant's contention here. In that case Spencer and wife mortgaged property to Swiggert, who assigned the mortgage to Bishop, who brought suit thereon and caused Burr, the sheriff, to sell the mortgaged premises. Hooker, who had no connection with the mortgage or any lien upon the land, purchased the property at the sale for a sum greatly in excess of the amount of the mortgage. One Rhodes, who was a judgment creditor of Spencer, the mortgagor, assumed to redeem by paying to the sheriff the amount of the purchase price paid by Hooker, together with one per cent per month interest, as required by the statute then in force. This the sheriff accepted, but Hooker refused to receive it, and thereafter Burr executed a deed to Rhodes. Hooker brought a suit to set this deed aside for the alleged reason that when the mortgage was executed the law of California provided that a judgment debtor, or redemptioner, might redeem from the purchaser at a foreclosure sale at any time within *six months* after the sale, by paying the purchase money and *two* per cent interest; and that in the case then at bar the redemptioner had allowed more than six months to elapse and had paid the purchase money only and *one* per cent interest. It appeared that after the execution of the mortgage but before the foreclosure and sale, the law had been amended so as to permit a redemption within one year and reducing the interest from two per cent to one per cent. Hooker contended that these provisions were void as to him, because they impaired the obligation of a contract. It was held in substance that Hooker, being an independent purchaser, was not in privity with the original mortgagee; that as the original mortgage debt had been paid in full, from the sale of the property, and the mortgagee had not been a pur-

chaser at the sale, he was not affected by a technical violation of a contract, which violation could not possibly injure him, and that a discussion of whether the contract—as between him and the mortgagor—had been impaired would be purely academic. Concluding this branch of the discussion, the court said:

“The question of the impairment of the mortgage contract therefore, is not before us as between mortgagor and mortgagee.”

The court says further:

“We are of the opinion that, as to the plaintiff in error, an independent purchaser at the foreclosure sale, having no connection whatever with the original contract between the mortgagor and mortgagee, his rights are to be determined by the law as it existed at the time he became a purchaser, unless upon action taken by the mortgagee the property had been sold under a decree providing that it should be sold without regard to the subsequent legislation which impaired his contract. The purchaser bought at the time when the law as altered was in operation, and, so far as he was concerned, it was a valid law; his contract was made under that law, and it is no business of his whether the original contract between the mortgagor and mortgagee was impaired or not by the subsequent legislation. He cannot be heard to contend that the original law applies to him, because a subsequent statute might be void as to some one else. The some one else might waive its illegality or consent to its enforcement, or the question might have no importance, because the property sold for enough to pay the debt, even though there was an abstract impairment of the obligation of his contract.

“The purchaser must found his rights upon the law as it existed when he purchased. An alteration after he had purchased, to his prejudice, would be a different thing: Cooley on Const. Limitations (4 ed.), 356. We agree that the law existing when a mortgage is

made enters into and becomes a part of the contract, but that contract has nothing to do, so far as this question is concerned, with the contract of a purchaser at a foreclosure sale having no other connection with the mortgage than that of a purchaser at such sale. His rights regarding matters of redemption are to be determined as we have stated."

The sum of the whole opinion seems to be that as between the mortgagor or his assignee and the mortgagee, such mortgagee or his assignee has the right to insist upon redemption, according to the requirements of the statute in force at the time the mortgage was executed, but that an independent purchaser at the mortgage sale has no such privity with the contract between the mortgagor and mortgagee, as entitles him to insist on redemption in accordance with the law existing at the time of execution; but on the contrary, will take the property subject to the provisions of the law in force at the time of the sale.

3. The logic of the opinion seems, to the writer, to be questionable, but it is the decision of the highest court of the land upon a question arising under the Constitution of the United States, and this court must accept it.

The case at bar stands upon a different footing. Here the mortgagee was the purchaser at the foreclosure sale. The property did not bring the amount of the mortgage. On May 2, 1919, Mrs. Rosin conveyed to petitioner herein all her right, title and interest in the property which, in effect, conveyed all her rights arising under the certificate of sale executed to her when she purchased the property. Plaintiff was not an independent purchaser at the sale, but derived its right through Mrs. Rosin, the original mortgagee, and stood in her shoes. As Mrs. Rosin had a right

to insist on redemption within a year from the confirmation of the sale, petitioner, as her successor, had the same right. The fact that Mrs. Rosin succeeded in collecting the deficiency due her from the mortgagor by subsequently levying upon and selling other property of the mortgagor, can make no difference in the result. By virtue of the law existing at the time of the execution of the mortgage, which law was just as much a part of the contract as if it had been written into it, Mrs. Rosin was entitled to receive a deed at the end of the one year from the confirmation of the sale, if a sale of the property should become necessary. The law then specified no contingency under which this time could be extended. If it was competent for the legislature, after the mortgage had been executed, to extend the time for redemption ten days, there is no logical reason why it could not extend it for a year or even for a longer period. The length of time which a purchaser at a foreclosure must wait after confirmation before he can secure a full and indefeasible title to the premises offered for sale, might and frequently would influence him in making his bid. The law of the contract gave the mortgagee the right to receive a deed for the premises at the end of one year from the confirmation of sale. The law of 1917 extended this time to one year and ten days if a certain contingency should happen. To this extent it impaired the contract and is therefore inapplicable.

4. Another question is raised in regard to the sufficiency of the decree to support a sale. It appears that the mortgage described the property as situated in "Blackistone Addition" to the City of Portland, while the complaint and decree describe it as situated in "Blackstone's Addition." It is admitted in the petition and writ that the property sold was the identical

property mortgaged. The names "Blackistone" and "Blackstone" are so similar as to come fairly within the rule of *idem sonans*.

A judgment will be entered directing the sheriff to execute a deed to the petitioner. WRIT ALLOWED.

Argued April 11, reversed July 1, 1919.

PEERY v. FLETCHER.

(182 Pac. 143.)

Life Estates—Lease—Emblements—Rights of Undertenant.

1. Where a life tenant has leased land for the term of his life for a money rent payable annually, the doctrine of emblements applies with full force to the undertenant; he having even greater privileges than his lessor, the life tenant whom he represents.

Life Estates—Lease by Life Tenant—Death of Lessor—Apportionment of Rent.

2. At common law, where a life tenant leases the estate for a term of years at a yearly rent and dies before one of the rent days, the rent cannot be apportioned, and the tenant could quit free of rent from the last rent day; neither the personal representatives of the lessor nor the reversioner having power to collect the rent.

Common Law—English Statutes—Applicability.

3. English statutes passed before the emigration of our ancestors, in aid or amendment of the common law, applicable to our condition and not repugnant to our institutions, constitute a part of our common law.

Common Law—Adoption—Applicability.

4. The common law as it existed in England at the time of the settlement of the American colonies has been adopted so far only as its general principles were suited to the habits and conditions of the colonies and in harmony with the genius, spirits and objects of American institutions, and whether common-law rules will be followed strictly depends, where no vested rights are actually concerned, upon the extent of which they are reasonable and in consonance with public policy and sentiment.

[As to adoption of common law, see note in Ann Cas. 1918A, 981.]

Common Law—Adoption.

5. In Oregon the common law of England was adopted as it existed, modified and amended by the English statutes passed prior to the Revolution.

Life Estates—Lease—Apportionment of Rents—Effect of Death of Life Tenant—Common-law Rules—Adoption.

6. The common law of England as modified by Statute of 11 Geo. II, c. 19, Section 15, giving an executor or administrator of a life tenant, on whose death a lease granted by him had determined, the right to recover of the tenant a ratable portion of the rent from the last day of payment to the death of lessor, being reasonable and suited to the conditions and customs of the state and not conflicting with the Constitution or statutes thereof, was adopted as part of the common law of the state.

Statutes—Construction—Copied Statutes—Intent of Legislature.

7. The rule that, where a statute is copied from that of another state, the construction of the duplicated statute by the highest court of the state from which it is taken will be adopted, does not apply where the legislature adopting the latter statute had a different intention.

Landlord and Tenant—Payment of Rent—Constructive Eviction.

8. There cannot be a constructive eviction without a surrender of possession, and the tenant will not be permitted to remain in possession and escape payment of rent by pleading a state of facts which, though conferring a right to abandon, has not been accompanied by the exercise of that right.

Life Estates—Lease—Death of Life Tenant—Apportionment of Rent Due to Life Tenant by Subtenant.

9. Where a life tenant leased the property for the period of the life tenancy for a money rent payable annually and died before annual crops had matured and before the annual rent for that year was due, the rent could be apportioned between the life tenant's personal representatives and the reversioner as to time, in view of Sections 7169, 7170, L. O. L., modifying the common-law rule that such rents could not be apportioned.

From Yamhill: HARRY H. BELT, Judge.

Department 2.

This is an appeal by plaintiff from a judgment overruling a demurrer to the defendant's answer and granting a judgment in favor of the defendant as for want of a reply.

The action is brought by the administrator of the estate of Catherine E. Martin, deceased, to recover rent reserved in two leases. On the seventeenth day of October, 1915, Catherine E. Martin, now deceased, was the owner and in the possession of an estate for

her own life of two parcels of land containing 56 acres. On that date, by her guardian, she leased 45 acres of the tract to the defendant Henry Lee Fletcher for the remainder of her natural life. According to the terms of the contract of leasing the defendant agreed to pay the lessor the sum of \$180 per annum, payable on August 1st of each year; the first payment to be made on August 1, 1916.

The complaint alleges that the whole of the real property so leased was tillable, agricultural land, suitable for raising annual crops of grain; that the defendant entered into possession and proceeded to raise such crops and paid the rent for the first year on August 1, 1916; that thereafter defendant cultivated all of the land and planted the same to yearly crops of grain to be harvested during the season of 1917; that Catherine E. Martin died on the eleventh day of July, 1917, after the crops were planted. The other tract of eleven acres was, in October, 1916, leased by Catherine E. Martin to the defendant, who entered into the possession thereof and agreed to pay the lessor the sum of \$4 per acre per year. This land was also cultivated in the same manner as the other tract mentioned.

The defendant answered setting up the leases, particularly alleging that the lessor named therein leased to defendant the real property for and during the natural life of Catherine E. Martin; that the lease provided that it should begin on the first day of October, 1915, and that it should terminate at the death of said Catherine E. Martin; that the defendant should pay rent for the premises during the life of the contract of lease, the amounts mentioned in the complaint, and that the rent should mature and become due and payable every year during the natural life of said Cath-

erine E. Martin on the first day of August; that she died on the eleventh day of July, 1917, and the leasehold estate then terminated; that at the time of the leasing the defendant was and now is the owner in fee simple of two thirds of the 56 acres so leased, subject only to the life estate therein of Catherine E. Martin for and during her natural life only, and that the other one third belonged to the estate of J. S. Martin, the deceased husband of Catherine E. Martin, subject to the life estate of Catherine E. Martin; that the defendant had been in actual possession of all of the land so leased to him ever since the death of Catherine E. Martin as the owner in fee simple of two thirds thereof, and by the consent of the administrator of the estate of J. S. Martin, deceased, which is still being administered as to the other one third. Defendant alleges that by reason of the death of Catherine E. Martin, on the eleventh day of July, 1917, no part of the rent of \$224 that would have become due and owing to her on the first day of August, 1917, by the terms of the lease, if she had lived until that date, ever became due or payable to her or to her representatives or to the plaintiff, and that all the crops raised on the premises during the year 1917, matured after the death of Catherine E. Martin.

There were two separate answers to the separate causes of action relating to the two tracts of land of the purport above indicated.

Plaintiff demurred to defendant's answer for the reason that the same did not state facts sufficient to constitute a defense to plaintiff's complaint. The demurrer was overruled and the plaintiff by her counsel having stated that she did not desire to plead further, judgment was entered in favor of defendant for his costs.

REVERSED.

For appellant there was a brief over the name of *Messrs. McCain & Vinton*, with an oral argument by *Mr. W. T. Vinton*.

For respondent there was a brief over the name of *Messrs. Ramsey, Lange & Nott*, with oral arguments by *Mr. William M. Ramsey* and *Mr. L. E. Lange*.

BEAN, J.—It is submitted on behalf of plaintiff that where a tenant for life leases the real property to a subtenant and such tenant plants an annual crop and his estate terminates by the death of the life tenant after the planting of crops of annual growth and before the day for payment of rent, the under-tenant is entitled to such annual crops growing at the time of the death of his lessor as emblements and is entitled to ingress and egress to and from the land for the purpose of removing the same. Therefore as the defendant had the full benefit of the issues and profits of the land for the full year, he should pay the rents to the representative of the life tenant: Citing 2 Blackstone's Comm. (Lewis' ed.), 120-123; 4 Kent's Comm. (14 ed.), p. *73; Washburn on Real Property (6 ed.), 120 et seq.; *Noble v. Tyler*, 61 Ohio St. 432 (56 N. E. 191, 48 L. R. A. 735, 736); 16 Cyc. 620, subd. 4; *Carman v. Mosier*, 105 Iowa, 367 (75 N. W. 323, 324).

It is the position of counsel for defendant that the rule in regard to emblements does not apply if the owner of life estate leases the land to a tenant and the tenant covenants to pay him a money rent, and the lessor dies before the rent falls due, his representative cannot collect the rent because the life tenant's estate in the land terminated before the rent accrued, and the rent cannot be apportioned as to time, and money cannot be considered emblements.

1. The doctrine of emblements applies with full force in regard to the under-tenant. He has even greater privileges than his lessor, the life tenant, whom he represents; as in a case where such lessor forfeits his right to emblements by his own act; such act, or forfeiture does not deprive the under-tenant of his emblements: 2 Blackstone's Comm. (Lewis' ed.) 123; 4 Kent's Comm, (14 ed.), *74; 5 M. A. L., § 406, p. 317; *Edghill v. Mankhey*, 79 Neb. 347 (112 N. W. 570, 11 L. R. A. (N. S.) 689); *Bradley v. Bailey et al.*, 56 Conn. 374 (15 Atl. 746, 7 Am. St. Rep. 316, 1 L. R. A. 427, 428). In *Reed v. McGouirk* (Tex. Civ. App.) (35 S. W. 527), it was held that if a subtenant of a life tenancy rents only so many acres of land, on which to make a crop, with no right to retain the land after the crop is taken off, the life tenant's administrator has the right to all the rent reserved by the contract; but if the use of dwellings and pastures, and other valuable rights, are embraced in the rent contract, which, at the death of the life tenant, pass to the reversioner, the administrator is entitled to the full amount of the rent contract, less the fair proportionate value of the use of such of the premises as the tenant's crops do not occupy, estimated from the death of the life tenant to the end of the rental term as fixed by the contract.

The doctrine of emblements is not decisive of this case. The particular question is in regard to the rent upon which the rule in respect to emblements often has a bearing.

2. By the rule of the common law where a life tenant leases the estate for a term of years at a yearly rent and dies before one of the rent days, the rent cannot be apportioned and the tenant could quit free of rent from the last rent day. The rent could not be collected by the personal representatives of the lessor for

the reason that the lease terminated before any rent became due; and it could not be collected by the reversioner as the lessor's death terminated the lease. It has been held, however, that if the tenant remains in possession after the termination of the life estate and the reversioner acquiesces, the latter may recover for use and occupation from the lessor's death: *Hoagland v. Crum*, 113 Ill. 365 (55 Am. Rep. 424); *Guthmann v. Vallery*, 51 Neb. 824 (71 N. W. 734, 66 Am. St. Rep. 475). It has also been held that if the lessee of a tenant for life remains in possession after the termination of the life estate without any contract with the reversioner and pays the full amount of rent reserved in the lease to the administrator of the tenant for life, the reversioner has no claim against the estate of the life tenant for the rent thus paid.

The Statute of 11 Geo. II, Chapter 19, Section 15, gave the executor or administrator of a life tenant, on whose death a lease granted by him had determined, the right to recover of the tenant a ratable proportion of the rent from the last day of payment to the death of the lessor. The date of the Statute of 11 Geo. II is given as 1738. In some jurisdictions in this country statutes of similar import have been enacted or such statutes have been adopted by the courts as a part of the common law: *Perry v. Aldrich*, 13 N. H. 343 (38 Am. Dec. 493); note L. R. A. 1915C, p. 208. The English statute in terms applied only to leases granted by a life tenant where the life tenant died, and it has been held in this country in a case where the statute was assumed to be in force that the statute did not apply to a lease by one holding a life estate *pur autre vie*: *Perry v. Aldrich*, 13 N. H. 343 (38 Am. Dec. 493). In some jurisdictions in this country, it has been held

that the English statute was not in force and that the common law remains unchanged in this respect: *Hoagland v. Crum*, 113 Ill. 365 (55 Am. Rep. 424); 16 R. C. L., § 82, p. 603. Later legislation in England has gone still further. The Statute of 4 W. IV, see Chapter 22, after reciting that by law rents due at fixed periods were not apportionable, and after reciting the inconvenience of that rule, proceeds to declare that all rents made payable at such periods under any instrument executed after the passing of the act, should be apportioned so that on the termination, by death or any other means, of the estate of the person entitled to the rents, such person, or his representative, should have a portion of such rents, according to the time elapsed since the last period of payment. By a further provision, the entire rent is to be received and recovered from the tenant, by the person who would be entitled to recover it if the act had not been passed, and is to be held by him subject to apportionment, which can be enforced against him by suit at law, or in equity: *Marshal v. Moseley*, 21 N. Y. 280.

In 3 Kent's Comm. (12 ed.), *470, we read thus:

"The objection to the doctrine of the apportionment of rent was, that it exposed the tenant to several suits or processes of distress, for a thing which was originally entire, and he ought not to be obliged to pay his rent in different parcels, and to several landlords, when he contracted to pay, in one entire sum, to one person. But the convenience of mankind dictated the necessity of an apportionment of rent in a variety of cases. Though it was a principle of the common law that an entire contract could not be apportioned, yet the apportionment of rent was, under certain circumstances, allowed by the common law, either on severance of the land from which it issued, or of the reversion to which it was incident. A person has a right to sell the whole or any part of his reversionary interest

in land. It may be necessary to divide his estate out on rent among his children, or to sell part to answer the exigencies of the family; and it would be intolerable if such a necessary sale worked an extinguishment of the whole rent. The rent passes as an incident to the purchaser of the reversion, and the tenant may always avoid several suits and distresses by a punctual payment of his rent."

In Tiedeman on Real Property, Section 67, after stating the common-law rule, the author states:

"But this injustice of the common law has now been remedied by statutory changes, so that now generally, the rent is apportioned between the life tenant and reversioner, giving each his *pro rata* share according to the time of enjoyment of the lease before, and after, the tenant's death. And the personal representatives of the life tenant may sue the tenant for years for the rent which may be apportioned to him."

See 1 Washburn on Real Property (6 ed.), Sections 245, 246.

It is the position of counsel for plaintiff that the English statutes adopted prior to the settlement of the colonies became part of the common law of the colonies. Citing among other authorities, *Evans v. Cook*, 11 Nev. 69; *Ex parte Blanchard*, 9 Nev. 101; *Commonwealth v. Knowlton*, 2 Mass. 529, 530. In the latter case the court at page 534 of 2 Mass., uses the following language:

"Our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law, thus claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the

common law. Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice."

3. It is stated as a general rule that English statutes passed before the emigration of our ancestors, in aid or amendment of the common law, applicable to our condition, and not repugnant to our institutions, constitute a part of our common law: 6 Am. & Eng. Enc. of Law (2 ed.), 277; *Norris v. Harris*, 15 Cal. 226; *Hunt v. Chicago etc. Ry. Co.*, 20 Ill. App. 282, 289; *Swift v. Tousey*, 5 Ind. 196; *Baker v. Crandall*, 78 Mo. 584 (47 Am. Rep. 126); *Hamilton v. Kneeland*, 1 Nev. 40; *Borgardus v. Trinity Church*, 4 Paige Ch. (N. Y.) 178; *Van Rensselaer v. Hays*, 19 N. Y. 68 (75 Am. Dec. 278).

The Constitution of the State of Oregon became operative April 14, 1859. By Article XVIII, Section 7 of that organic law, it is provided that:

"All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered or repealed."

See *Runyan v. Winstock*, 55 Or. 202 (104 Pac. 417, 105 Pac. 895).

4, 5. The common law, as it existed in England at the time of the settlement of the American colonies, has never been in force in all of its provisions in any colony or state of the United States. It has been adopted so far only as its general principles were suited to the habits and conditions of the colonies, and in harmony with the genius, spirit and objects of American institutions. Different geographical conditions may justify modifications, and whether common-law rules will be followed strictly in the United States

will, necessarily, where no vested rights are actually concerned, depend upon the extent to which they are reasonable and in consonance with public policy and sentiment. What may be the common law in one state is not necessarily so considered in another. In many jurisdictions in the United States the rules of the common law of England have been held by the courts to be in full force so far as the same are applicable and of a general nature, and are not in conflict with the Constitution or special enactments of the legislature. This is the rule in Oregon: See note, 30 Ann. Cas. 1913E, pp. 1232, 1241; *Brummet v. Weaver*, 2 Or. 168; *Rugh v. Ottenheimer*, 6 Or. 231 (25 Am. Rep. 513); *Velten v. Carmack*, 23 Or. 282 (31 Pac. 658, 20 L. R. A. 101). In some of the states all statutes and acts of the British parliament which were passed prior to the fourth year of James the First are declared to be a part of the law of the state: 6 Am. & Eng. Enc. of Law (2 ed.), p. 278. The common law with all the statutes amending it prior to a certain time was adopted excluding statutes passed afterwards unless expressly adopted. In applying the general rule to a state which, like ours, had no political existence before the Revolution, it must in harmony with reason be held that when our territorial legislature and the framers of our Constitution and our courts recognized the existence here of the common law, they must have had reference to that law as it existed, modified and amended by the English statutes passed prior to the Revolution: *Coburn v. Harvey*, 18 Wis. 156; *State v. Rollins*, 8 N. H. 550; *Bent v. Thompson*, 5 N. M. 408 (23 Pac. 234); *O'Ferrall v. Simplot*, 4 Iowa, 381; *Dawson v. Coffman*, 28 Ind. 220; *Borgardus v. Trinity Church*, 4 Paige Ch. (N. Y.) 178, 198. It is not necessary in the case at bar to fix the exact age of the English statutes

which were engrafted into the common law and recognized as apart of the law of this state.

6. It goes without saying that the common law of England as modified by the Statute of 11 Geo. II, Chapter 19, Section 15, is reasonable and suited to the conditions and the customs as they have existed in this state ever since its admission to the Union, and is in no way in conflict with the Constitution or statutes of this state.

As we view it the question in this case as between the administrator of Catherine E. Martin the life tenant, now deceased, and the lessee should be considered in the same manner as though the lessee of the life tenant was not the reversioner of any part of the estate. Section 7169, L. O. L., which has seldom, if ever, been applied, provides as follows:

“Every person in possession of land out of which any rent is due, whether it was originally demised in fee, or for any other estate of freehold, or for any term of years, shall be liable for the amount or proportion of rent due from the land in his possession, although it be only a part of what was originally demised.”

Section 7170 reads:

“Such rent may be recovered in an action at law, and the deed of demise, or other instrument in writing, if there be any, showing the provisions of the lease, may be used in evidence by either party, to prove the amount due from the defendant.”

Upon the first reading of our statute, while it is couched in different language from the statute of 11 Geo. II, Chapter 19, Section 15, seems to be in broad terms and evidently adopts the principle of the English statute, and there is much reason to believe that it was aimed to cure the mischief of the old common-law rule prohibiting the apportionment of rent *pro rata* as

to time as well as other supposed defects and conditions of such rule.

In note to *Ex parte Smyth*, 1 Swanston's Rep. 337-340, we find that:

"In *Wykham v. Wykham*, Sir James Mansfield inquired whether 'It had ever been determined that the executor of a tenant *pur autre vie* is entitled to recover a portion of the rent from the last quarter-day under the statute?' observing, that 'he is certainly within the mischief; for otherwise, the tenant of the land may keep the rent for his own benefit': 3 Taunt. 331."

The provisions of these sections of our Code were referred to in the following cases: *Stewart v. Perkins*, 3 Or. 508; *Holman v. De Lin River Finley Co.*, 30 Or. 428 (47 Pac. 708); *Campbell v. Stetson*, 2 Met. (Mass.) 504. In *Stewart v. Perkins*, 3 Or. 508, this court said:

"The old common-law doctrine was that a rent charge could not be apportioned by the act of the landlord, on the principle that the contract was an entirety, and could not be apportioned. The objection was 'that it exposed the tenant to several processes of distress for a thing which was originally entire, and he ought not to be obliged to pay his rent in different parcels, and to several landlords, when he contracted to pay one entire sum to one person.'

"Sections 31 and 32 of the statute heretofore referred to (now Sections 7169 and 7170, L. O. L.) were copied from Sections 22 and 23 of Chapter 60, of the Revised Statutes of Massachusetts. They were adopted there, to remedy a supposed defect in the old law, and to authorize an apportionment of rent in certain cases where a reversioner wishes to sell his estate in different parts, to different persons, or to make provision for his children. The Supreme Court, the highest judicial tribunal of that state, has given a judicial construction to the two sections contained in their statute. In *Campbell v. Stetson*, reported in 2

Met. (Mass.) 504, Shaw, C. J., in delivering the opinion of the court, says:

“These are part of a series of provisions respecting long terms, where a rent is reserved, and where the lands out of which such rents are to issue, are to be treated as real estate, and as such may be divided and subdivided by descent, partition, levy of execution and otherwise, with various detailed provisions in regard to terms, and the apportionment and recovery of rents. But these statutes do not declare when, and by what acts, a right to rent shall be created, vested, and transferred, but only declare how it may be recovered when it is due; that is, apportioned and recovered in an action of debt. They are intended to prescribe remedies—not to establish rights.’”

Massachusetts has a statute Section 4 of Chapter 121, Public Statutes of Mass. 1882, which reads:

“Every person in possession of land out of which rent is due shall be liable for the amount or proportion of rent due from the land in his possession, although it is only a part of what was originally demised.”

Section 5 of that chapter being identical with Section 7170, L. O. L. If the construction contended for by defendant is the interpretation of this statute which our lawmakers intended to serve the people of this state since 1854, it is difficult to conceive the purport of the addition in one of the sections of the Massachusetts statutes and also in our Section 7169, which addition is in the following words:

“Whether it was originally demised in fee, or for any other estate of freehold, or for any term of years.”

It is submitted by the learned counsel for the defendant, that the Massachusetts statute from which ours was taken intended to make provision for the apportionment and collection of rents only where the

demised lands, after the execution of the lease, were divided or subdivided. In other words, that the apportionment of rent as to estate is permissible, but that such an apportionment cannot be made as to time. We may say there is much force to the proposition as we do not claim the matter is free from doubt.

In 16 R. C. L., Section 445, page 938, it is stated in regard to the apportionment of rent with respect to time after announcing the common-law rule as follows:

"The hardship in the case of the death of a lessor holding for his own life was remedied by the Act of 11 Geo. II, c. 19, which authorized a recovery by his personal representatives of a proportionate part of the rent, where such a tenant died before or on that day on which the rent became due, and similar statutes have been enacted in some jurisdictions in this country. This provision, however, has been held not to apply in case of a lease by a tenant *pur autre vie* terminated by the death of the *cestui que vie*. In case of a total eviction of the tenant by the wrongful act of the landlord or even by a title paramount, there is no apportionment of the rent with respect to time, and therefore the tenant is not liable for any portion of the unaccrued rent, though he enjoyed the use of the premises for a time after the last rent day."

7. The rule where a statute is copied from that of another state that the construction of the duplicated statute by the highest court of the state from which it is taken, is subject to important modifications. A different construction is often given where it is plain that the legislators adopting the later statute meant differently. From the few decisions in the State of Massachusetts involving the different statutes there enacted it is difficult to determine the real intent and applicability of a portion of their statutes owing to partial repetitions in such enactments: Endlich, Inter-

pretation of Statutes, § 371; Black on Interpretation of Laws, § 70, p. 160; *Browning v. Smiley-Lampert Lumber Co.*, 68 Or. 502, 517 (137 Pac. 777).

In Endlich on Interpretation of Statutes, section 371, the author states:

"But, as applied to transcribed statutes, this rule is undoubtedly subject to important qualifications. Whilst admitting that the construction put upon such statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it, its binding force has been wholly denied, and it has been asserted that a statute of the kind in question stands upon the same footing, and is subject to the same rules of interpretation as any other legislative enactment. And it is manifest that the imported construction should prevail only in so far as it is in harmony with the spirit and policy of the general legislation of the home state. * * "

Referring to Section 7169, L. O. L., "Every person in possession of land," the defendant Fletcher was in possession of the land in question. "Out of which any rent is due," rent is due out of the land leased by Mrs. Martin. "Whether it was originally demised in fee, or for any other estate of freehold." Mrs. Martin, the lessor, held a life estate, or an estate of freehold in the land, "Shall be liable for the amount or proportion of rent due from the land in his possession." Is the defendant liable for the proportion of the rent due from the land of which he held possession according to the terms of his agreement? Section 7170, L. O. L., provides that the rent may be recovered in an action at law.

The familiarity with the common law and English statutes, of some of the earlier lawmakers who drafted Sections 31 and 32 of the Statutes of Oregon of 1855,

which are now Sections 7169 and 7170, L. O. L., affords reason to believe that it was the purpose of the framers of the law to declare a rule which would cure the supposed defect and remedy the mischief of the old common law by sanctioning the principle of the Statute of 11 Geo. II, Chapter 19, Section 15, and also of subsequent legislation adopted in England prior to the Revolution, all in one statute instead of in several, thereby making the rule plain that one in possession of land leased to him by another who is the owner of an estate therein for his own life, or the owner of an estate for the life of another person reserving rent to be paid at stated periods, and where such lessor dies between two rent days, and also where the estate of a reversioner or remainder man is conveyed or descends in separate parcels, shall be liable for such rent, and that the same may be apportioned either as to time or estates.

8. The lease in question by its terms provided that it was to begin October 1, 1915, and to terminate at the death of Catherine E. Martin. There was no eviction of the lessee prior to the expiration of the lease. When Mrs. Martin died the lease simply terminated in accordance with the terms thereof. The land was not leased for a definite term of years. There was no breach of the contract of lease, either technical or otherwise, occasioned by the determination of the lease. There were excepted from the provisions of the lease, pasture and timber lands of the farm. All of the land leased during the last year was cultivated to annual crops so that the lessee having the right to enter and remove such crops after the termination of the lease obtained practically the full benefit of the land for the crop year of 1917. No notice appears to have been given by the defendant, the lessee, who re-

mained in possession of the land after the death of Mrs. Martin, that he was claiming possession thereof by virtue of any authority other than the lease. There cannot be a constructive eviction without a surrender of possession, and it would be unjust and unconscionable to permit the tenant to remain in possession and then escape the payment of rent by pleading a state of facts which, though conferring a right to abandon, had been unaccompanied by the exercise of that right: 16 R. C. L., § 457, p. 949. Citing *Keating v. Springer*, 146 Ill. 481 (34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544); *Leiferman v. Osten*, 167 Ill. 93 (47 N. E. 203, 39 L. R. A. 156); *Boreel v. Lawton*, 90 N. Y. 293 (43 Am. Rep. 170). It is not easy to account for the lack of further legislation in this state in regard to the apportionment of rents except that the belief was general that such legislation was unnecessary and Section 7169 covered the field the same as the English law.

9. The difficulty arises in this case by virtue of the subtenant being the reversioner of the leased land. As before stated, a proper solution can only be reached by treating him the same as if the land were leased to another person having no prospective interest therein. Based largely upon the common law, as modified by the English statute, which we think is appropriate to our conditions, and is adopted in this state, we hold that the rent in question should be apportioned.

This conclusion requires the reversal of the judgment of the lower court and a direction of a judgment in favor of plaintiff for the rent of the demised premises for nine and one-third months, or \$174.20.

REVERSED WITH DIRECTIONS.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Motion to dismiss appeal overruled September 3, 1918.
Argued on the merits April 15, reversed and remanded May 20, rehearing denied July 8, 1919.

MARTIN v. MORELAND.

(174 Pac. 722; 180 Pac. 933.)

Appeal and Error—Period in Which to File Transcript.

1. Where undertaking was filed January 14th, and was not excepted to, the period in which to file transcript did not expire until 30 days from January 19th, the appeal not having been perfected, under Section 550, subdivision 4, L. O. L., until the expiration of the five-day period after filing of undertaking.

[As to time for appeal, see note in Ann. Cas. 1917E, 930.]

ON THE MERITS.

Words and Phrases—"Gilt Edge."

2. The term "gilt edge," as applied to commercial paper, is a colloquialism, meaning of the best quality or highest price, first class, and not implying that a note which is not gilt edge is not collectible, or that the maker is irresponsible.

Fraud—Right to Recover—Injury.

3. The seller of furniture in a rooming-house to one who paid in cash and note secured by mortgage could not recover damages from the purchaser and another, charged to have conspired to create a pretended security, by execution of mortgage without actual consideration, unless he suffered some injury.

From Multnomah: EDWIN V. LITTLEFIELD, Judge.

In Banc.

Defendant Painter appeals from a judgment rendered against him in the above-entitled action. Judgment was rendered November 21, 1917, notice of appeal was served December 19, 1917, and on the same date an undertaking on appeal was served and duly filed, but for some reason not apparent it was stipulated by counsel that a new undertaking should be filed and that the sureties should appear and justify on January 10, 1918, at 1:30 P. M. At said time the court sustained the objection to the sufficiency of the sureties and on January 14th, a new undertaking was filed which was not excepted to. Nothing further was

done in the case until February 16, 1918, when an order was made by the court extending the time to file the transcript on appeal until and including March 16, 1918.

Plaintiff moves to dismiss the appeal because no order extending the time to file the transcript was made prior to the expiration of the time to file the transcript.

MOTION OVERRULED.

Mr. Charles J. Swindells, for the motion.

Mr. F. E. Melvin and *Mr. Samuel B. Huston*, *contra*.

McBRIDE, C. J.—Under the provisions of Section 550, subdivision 4, L. O. L., the appeal was perfected on January 19, 1918, this being five days after the last undertaking was filed. The appellant then had thirty days within which to file his transcript in this court, which time would have expired on February 18, 1918. The extension was granted on the sixteenth day of February and was, therefore, two days before the expiration of the period allowed by law. The transcript was filed here on March 15, 1918, and was within time.

MOTION OVERRULED.

Reversed and remanded May 20, 1919.

ON THE MERITS.

(180 Pac. 933.)

From Multnomah: EDWIN V. LITTLEFIELD, Judge.

Department 1.

This is an action for damages. The complaint alleges that plaintiff was the owner of an interest in

certain furniture in a rooming-house, of a value exceeding \$252, and defendant Moreland, being desirous of purchasing the same, offered therefor \$100 in cash, and a note for \$150, secured by a mortgage upon a lot in North Pacific Addition to the City of Astoria. It is averred that Moreland represented to plaintiff that the note and mortgage were worth the face value, and that "said note and mortgage was gilt edge and first class in every respect and well secured." The usual allegations follow, in regard to plaintiff's reliance upon these representations, and the consequent sale and delivery of the furniture, with acceptance of the note and mortgage in part payment therefor. These recitals are followed by averments to the effect that the representations as to the value of the note and mortgage were false and fraudulent,

"in that, the purported note and mortgage was not 'gilt edge' and was not well secured; that the property described in said purported mortgage is worthless and valueless and is assessed for the sum of one dollar, and said defendant Moreland knew at the time he made said representations and statements that the property described in said purported mortgage was worthless and valueless."

There are further recitals charging a conspiracy upon the part of the several defendants to create a pretended security by the execution of the mortgage without any actual consideration, upon worthless land, for the purpose of defrauding plaintiff, who asks for judgment in the sum of \$150, with interest. The defendant Painter demurred to the complaint, which demurrer being overruled, he answered, denying the material allegations of the complaint and pleading affirmatively the genuine character of the mortgage, and asserting its *bona fides*. A trial was had upon

the issues thus joined, at the beginning of which the defendant Painter objected to the admission of any evidence for plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The objection was overruled, and an exception saved. By agreement of the parties the cause was tried by the court without a jury, and there was a judgment for plaintiff, from which defendant Painter appeals. REVERSED AND REMANDED.

For appellants there was a brief over the names of *Mr. S. B. Huston* and *Mr. F. E. Melvin*, with an oral argument by *Mr. Huston*.

For respondent there was a brief and an oral argument by *Mr. Charles J. Swindells*.

BENSON, J.—2. The first and most important assignment of error is the one which attacks the sufficiency of the complaint. It will be observed that the complaint contains no allegation to the effect that the defendant Schmidt, the maker of the note, is insolvent or irresponsible, and all that is said in regard to the value of the note is, that it is not “gilt edge,” and was not well secured. The term “gilt edge,” as applied to commercial paper, is a colloquialism, and its meaning, as given in the Standard Dictionary is, “of the best quality, or highest price; first class; as, gilt edge securities.” This, obviously, does not imply that a note which is not “gilt edge” is not collectible, or that the maker is irresponsible. For all that appears in the complaint, the maker of the note may have been amply able, and perfectly willing to pay the face of the note with accrued interest at maturity.

3. It requires no citation of authorities to support the doctrine that a litigant is not entitled to recover damages unless he has suffered some injury, and it follows that the demurrer should have been sustained.

A motion to dismiss the appeal was submitted and denied (*Martin v. Moreland, ante*, p. 61 (174 Pac. 722)), and was again called to our attention at the time of argument upon the merits. We have again examined the record and find that the motion is without merit.

It may be that the facts will justify an amended complaint, but that is a subject for the consideration of the trial court. The judgment is reversed and the case will be remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED. REHEARING DENIED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ.,
concur.

Argued June 5, affirmed July 8, 1919.

COLE v. CITY OF SEASIDE.

(182 Pac. 165.)

Municipal Corporations—Streets—County Roads—Control by City.

1. Although a county road may traverse land within the limits of an incorporated city or town, yet, unless the state through its legislative department, or the county as the agent of the state, employing procedure prescribed by statute, surrenders authority over the road, the city cannot assume control.

Dedication—County Roads—Acceptance—Improvement.

2. Where many years prior to the adoption of the original act incorporating municipality a highway located within the boundaries of the municipality was laid out, and the county expended money in improving the road, both before and after incorporation, there was a dedication and acceptance by the county constituting the highway a regular county road.

[As to acceptance implied from user, see note in 129 Am. St. Rep. 621-629.]

Municipal Corporations—Streets—County Road.

3. The mere fact that the county road is embraced within the boundaries of a recently created municipality does not *ipso facto* make it a city street.

Municipal Corporations—Street Improvements—Powers of—County Road—Authority.

4. Mere consent will not confer jurisdiction upon a tribunal having limited authority in matters where it has no power to conduct such proceeding, and therefore consent of abutting owners to the improvement of a county road within its limits does not give the municipality jurisdiction to order such improvement.

Municipal Corporations—Public Improvements—Estoppel of Abutting Owner—Assessments.

5. Where municipal authorities ordered the improvement of county road within its boundaries, the fact that an abutting owner, in remonstrating or protesting against the improvement, referred to the road as a street, using the same language that was used by the council in the ordinance ordering the improvement, does not estop such property owner from denying the authority of council to order the improvement.

Municipal Corporations—Road Improvements—Council Authority.

6. While the electors of a municipality may, pursuant to Article XI, Section 2, of the Constitution through the exercise of initiative power conferred in Article IV, Section 1a, amend the charter, such power does not authorize a municipality to do anything not strictly forbidden, and to warrant a municipality in improving a county road such power must be plainly disclosed by the terms of its charter, which must be strictly construed.

From Clatsop: JAMES A. EAKIN, Judge.

Department 1.

This is a suit to restrain the defendant city and its officers from enforcing against the plaintiff's realty an alleged lien claimed by the municipality for the expense of improving what the plaintiff maintains is a county road, in front of his premises, and the city contends is a street within its corporate limits. This is the second appeal in this cause. It first came before this court on demurrer to the complaint and the opinion is reported in 80 Or. 72 (156 Pac. 569). After the case was remanded for further proceedings, an issue of fact was joined on the allegation of the plaintiff

that the way in question was a county road, testimony was taken and a decree rendered in favor of the plaintiff, from which the defendants appeal. **AFFIRMED.**

For appellants there was a brief over the names of *Mr. Victor J. Miller*, City Attorney, and *Messrs. G. C. & A. C. Fulton*, with oral arguments by *Mr. Miller* and *Mr. G. C. Fulton*.

For respondent there was a brief and an oral argument by *Mr. E. E. Gray*.

BURNETT, J.—1. The demurrer considered in the former opinion admitted the averment of the complaint that the way in question is a public county road, which, as we decided there on construction of the legislative charter of Seaside, the city had no jurisdiction to improve. The same doctrine was approved in *Christie v. Bandon*, 82 Or. 481 (162 Pac. 248), and in *Cooper v. Fox*, 87 Or. 657 (171 Pac. 408). The law may thus be considered as settled, that although a county road may traverse land within the limits of an incorporated city or town, yet unless the state through its legislative department, or the county as the agent of the state, employing the procedure prescribed by the statute, surrenders the authority over the county road, the city cannot assume such control.

2. In view of the denial by the defendants that the thoroughfare in question is a county road, it becomes necessary to examine the testimony in order to determine that issue of fact. At the trial the plaintiff introduced various records and files of the County Court, showing acts of control exercised by the county over the way in question. In order to save the expense of

the exemplification of those records, it was stipulated by the parties that:

“The way in question described in the pleadings and evidence herein as ‘Seventh Street’ in the city of Seaside (formerly town of Seaside) in Clatsop County, State of Oregon, was at the date of and for many years prior to the adoption of the original act incorporating the town of Seaside (now City of Seaside) had been a public highway by user, the same having been used and employed by the public as a common public highway for travel for over twenty years prior to the adoption of the original act incorporating the town of Seaside.”

It is in testimony that the county authorities caused the road to be surveyed before Seaside was ever incorporated, and that the county also expended money and labor in improving it both before and after the incorporation of the city. This amounts to a dedication of the road for public use by acts *in pais* coupled with an acceptance by the county, thus constituting it a regular county road. This is the doctrine taught in the cases of *Bayard v. Standard Oil Co.*, 38 Or. 438 (63 Pac. 614); *Nosler v. Coos Bay R. R. Co.*, 39 Or. 331 (64 Pac. 644, 22 Am. & Eng. R. R. Cas. 720); *Ridings v. Marion County*, 50 Or. 30 (91 Pac. 22), and *Eastman v. Clackamas County (C. C.)*, 12 Sawy. 613 (32 Fed. 24). The stipulation together with the undisputed facts relating to the control exercised over the way by the County Court stamp it indubitably as a county road.

3. Upon the facts as admitted by the demurrer, we decided in the former opinion that the county had not surrendered control over the county road; nor had the state done so by any legislation relating to the town or City of Seaside, and hence that the city had no authority to improve the same. The conclusion there reached has been stoutly contested by the defendants both in

their brief and in the oral argument. They cite a number of authorities in support of their proposition which they thus state:

"Whether a certain way is a street or county road is purely a matter of geography. If beyond the boundaries of a municipality, it is a county road; if within the boundaries of a municipality, it is a street."

These precedents have had our careful consideration and while some of them declare as a conclusion from the legislation involved that the incorporation of a road within the city limits makes it *ipso facto* a street, a careful analysis shows that the rule announced in those decisions rests upon a construction of the statute there under consideration. For instance, in *Benton v. State*, 168 Ala. 175 (52 South. 842), the legislative charter required the city to keep in repair "all bridges, public roads and streets." *McGraw v. Stewart*, 51 Kan. 185 (32 Pac. 896), depends upon a general statute giving cities control of all ways within their boundaries. In such instances the state law has visited upon the cities authority over county roads within their limits to the exclusion of the county authorities. There are instances of the kind in Oregon, but this is not one of them. *County Commissioners v. City of Jacksonville*, 36 Fla. 196 (18 South. 339, 29 L. R. A. 416), states the principle thus:

"That whether the county commissioners had been deprived of a jurisdiction of such road within the new town organization depends upon the legislation upon the subject of public roads and municipal corporations, and that the intent of the legislature as manifested by the statute would control."

Again, *Sanderson v. Texarkana*, 103 Ark. 529 (146 S. W. 105), uses this language:

"The state in its sovereignty over all public highways has full power over the streets as well as over all public roads and unless prohibited by the Constitution the legislature may confer on such agency as it may deem best the power of supervision and control over streets."

In the light of these authorities cited by the defendants in support of their postulate, we are brought back to the rule declared by Mr. Justice BEAN in *Bowers v. Neil*, 64 Or. 104 (128 Pac. 433), that:

"Whether a county road becomes a street when included within the corporate limits of a city depends upon the intention of the legislature as gathered from the city charter, general laws and the whole course of legislation on the subject."

Under these circumstances it is not deemed necessary to reopen the discussion or to vary from the conclusions on the law reached in the former decision. As already pointed out by the testimony, the fact is that the way here involved is a county road as alleged in the complaint, so that thus far in the investigation both the law and the fact are with the plaintiff.

4 5. The only remaining question necessary to be considered is whether the plaintiff is estopped to resist the proposed sale of his property. The defendants rely greatly on the fact that while the matter of the proposed improvement was under consideration by the city council the plaintiff and others lodged with that body a writing which is here quoted, after the date and address:

"We, the undersigned, property owners in the district to be assessed for the improvement of Seventh Street, formerly and commonly known as Main Street, from its intersection with the south boundary line of Avenue B, produced westerly, formerly and commonly

known as Washington Street; to its intersection with the north boundary line of First Avenue, east of said Seventh Street, formerly and commonly known as Duane Street, in the city of Seaside, Oregon, in the following manner, to-wit: by paving said street forty feet in width, twenty feet on each side of the center line of said street, with gravel bitulithic pavement, by constructing artificial stone curbs along each said pavement, by making the necessary excavation and fill to bring said street to the established grade as established by Ordinance No. 107 of the city of Seaside, Oregon; hereby remonstrate against said improvement for the following reason:

"That the present street is in a good condition and that it is an unnecessary expense to the property owners to make such improvements until such time as the sewer shall have been laid upon the said street, also the present water mains will have to be changed within a short time, and until said sewer and water mains are laid permanently it would be an unreasonable expense to put on the property owners along said street.

"Trusting that you will give this remonstrance your careful consideration, we remain, your petitioners."

Admittedly this paper was signed by the plaintiff with others. First of all, this is a remonstrance, an objection. No importance can be attached to the fact that the way is called a street in the writing. That portion of the instrument is substantially a quotation of the language used by the city authorities in framing the ordinance and was probably used by the plaintiff and his associates to make the remonstrance correspond in nomenclature with the proceeding it was designed to oppose. The whole instrument amounts to no more than their saying:

"On the assumption of the city that this is a street we remonstrate against its improvement."

In no way do the signers submit themselves to the jurisdiction of the city or invite the municipality to incur the expense of paving.

The council had no jurisdiction over the subject matter of improving a county road at the expense of the abutting property owners. Mere consent will not confer jurisdiction upon a tribunal having limited authority in matters where it has no power to conduct such a proceeding. Since the case of *Strout v. Portland*, 26 Or. 294 (38 Pac. 126), it has been the rule in this state that:

“When in proceedings for the levy of an assessment for a public improvement, the common council is without jurisdiction from the beginning, a person whose property is benefited by the improvement, but who did not ask for such improvement, may deny the validity of the proceedings, although he made no objection while the improvement was in progress.”

The doctrine is thus stated in *Ladd v. Spencer*, 23 Or. 193, 198 (31 Pac. 474):

“But the respondent objected by written protest at the inception of the proceedings, and he thereby challenged the act of the council and its officers. It cannot be said that he encouraged the improvement. The charter made no provision that before a person could be heard in an equitable proceeding he must tender the amount of benefits. If an owner of property were obliged to do this as a condition precedent before he could maintain a suit, it would tend to do away with every jurisdictional requirement in the proper levy of special assessments, as the council of a city could, without observing the requirements of a charter, order the improvement of a street and compel the owner of the property benefited to tender the amount of the benefits before he could enjoin the officer from executing a void process.”

Like authority is found in *Smith v. Minto*, 30 Or. 351 (48 Pac. 166); *Bank of Columbia v. Portland*, 41 Or. 1 (67 Pac. 1112); *Jones v. Salem*, 63 Or. 126 (123 Pac. 1096), and *Dyer v. Bandon*, 68 Or. 406 (136 Pac. 652). In *Jones v. Salem* the municipality had laid down a system of sewers and attempted to collect the expense thereupon by assessment upon property said to be benefited. At that juncture the property owners resisted, on the ground that the city had not acquired jurisdiction, and were successful although the improvement had been made and was probably for the benefit of their holdings.

The defendants count on *Grimes v. Seaside*, 87 Or. 256 (170 Pac. 310), to sustain their contention that the plaintiff on account of his knowledge that the way in question, whether county road or city street, was being improved by the city, coupled with his failure to protest, is now equitably estopped to maintain this suit. In that case, however, as the opinion of Mr. Justice MOORE points out, the plaintiff himself with others had dedicated an extension of Bridge Street which was afterwards renamed Broadway Street, "no part of the improvement abutting upon his premises was made upon the county road," the street at that point as so dedicated being wholly south of the road and the charter formula for acquiring jurisdiction having been followed. There the way to be improved had been dedicated as a street and not as a road. Here it was dedicated as a county road before the city existed. There the county had not accepted the dedication so far as the record discloses. Here the county did accept the dedication by assuming control and expending money in its improvement even after the city was incorporated. There the charter gave the city juris-

diction over streets and it accepted the dedication by inaugurating a system of improvement on the street thus offered by the plaintiff himself. There the county never took control of the way, and here it has never surrendered such control in any way known to the law.

6. The error of the defendants seems to lie in the assumption that a chartered municipal corporation may do anything not strictly forbidden by its charter, especially as its voters may amend such instrument according to the second section of Article XI of the state Constitution through the exercise of the initiative power conferred by the same Constitution in Section 1a of Article IV. This assumption is not in harmony with the long-established rule of construction that warrant for any action of a city must be plainly disclosed by the terms of its charter, which must be strictly construed.

This rule of construction was followed in the decision of the former appeal of this case. In the later opinion by Mr. Justice HARRIS in *Portland v. Portland Ry. L. & P. Co.*, 80 Or. 271, 297 (156 Pac. 1058), treating of municipal power of taxation, we find this language:

“The rule is especially applicable to the power to tax (4 Dillon Mun. Corp. [5 ed.], Section 1378), because a city possesses no inherent power to tax and ‘the grant relied upon must be evident and unmistakable and all doubts will be resolved against its exercise and in favor of the taxpayer’: *Corbett v. City of Portland*, 31 Or. 407, 415 (48 Pac. 428); *Stevens v. Taylor*, 79 Or. 424 (154 Pac. 896).”

From the same pen came this excerpt in *Robertson v. Portland*, 77 Or. 121, 128 (149 Pac. 545):

"It is hornbook law that municipal corporations have no powers except such as are granted in express words by their charters, or such as are necessarily implied from those granted or those essential to the declared objects and purposes of the corporations: *Corvallis v. Carlile*, 10 Or. 139 (45 Am. Rep. 134); *Beers v. Dalles City*, 16 Or. 334 (18 Pac. 835); *Pacific University v. Johnson*, 47 Or. 448 (84 Pac. 704); *McDonald v. Lane*, 49 Or. 530 (90 Pac. 181); *Naylor v. McColloch*, 54 Or. 305 (103 Pac. 68); *Mutual Irr. Co. v. Baker*, 58 Or. 306 (110 Pac. 392, 113 Pac. 9); *Rosa v. Bandon*, 71 Or. 510 (142 Pac. 339)."

In *State ex rel. v. Port of Astoria*, 79 Or. 1 (154 Pac. 399), the court had under consideration two sections of our state Constitution, viz.: Article XI, Section 2, giving to the legal voters of every city and town "power to enact and amend their municipal charter, subject to the constitution and criminal laws of the State of Oregon," and Article IV, Section 1a, reserving the initiative and referendum powers "to the legal voters of every municipality and district as to all local, special and municipal legislation of every character in or for their respective municipalities and districts." By analogy the doctrine of strict construction in such matters and the reason for it are there given utterance as follows:

"While the prime purpose is to ascertain and give effect to the intention as expressed in the language employed, yet the two sections now being considered are designed to grant attributes of sovereignty to specified local subdivisions and such grant being a limitation on the power of the legislature, it should be strictly construed, as was properly held in *Thurber v. McMinville*, 63 Or. 410, 414 (128 Pac. 43); and this rule of construction must be applied here notwithstanding the suggestion broached in *State v. Schluer*, 59 Or. 18, 27 (115 Pac. 1057), and regardless of the

inference that may possibly be drawn from *Schubel v. Olcott*, 60 Or. 503, 515 (120 Pac. 375)."

Before the advent of the initiative and referendum the reason for construing strictly the legislative grants of power to municipalities in the form of charters was that they were in derogation of the sovereignty of the state. This being true as a canon by which to construe an act of the legislature which, as a law-making body is restrained only by the Constitution, it is equally applicable to a mere local fraction of the people exercising the initiative in enacting and amending charters, for this power is expressly subject not only to the same Constitution that controls the legislative assembly but also to "the criminal laws of the State of Oregon." It would be fallacious to lay down as a premise that all power over municipalities has been wrested from the legislative assembly and set at large to be employed only by those institutions themselves. On the contrary, we are taught in *State ex rel. v. Port of Astoria*, 79 Or. 1 (154 Pac. 399), that while the legislature cannot create a corporation by special law, yet "it has the power to provide for the formation of corporations under general laws, whether such corporations be private or public, essentially proprietary, or purely municipal." Not only so, but municipalities in their charter schemes are subject to the Constitution and criminal laws which are themselves restrictive in their operation. It logically follows that that which is the product of a limited authority and is in derogation of the primal sovereignty of the people, as embodied in the state government, should be strictly construed.

Drawing an analogy from such cases as *Northern Pacific Terminal Co. v. Portland*, 14 Or. 24 (13 Pac. 705); *Bewley v. Graves*, 17 Or. 274 (20 Pac. 322); *Sime*

v. *Spencer*, 30 Or. 340 (47 Pac. 919); *French-Glenn Co. v. Harney County*, 36 Or. 138 (58 Pac. 35), and *Jones v. Polk County*, 36 Or. 539 (60 Pac. 204), it might be argued that the acts of the defendant would be presumed to be regular. A very marked distinction, however, is to be observed respecting governmental agencies possessing limited functions, in the matter of obtaining jurisdiction *in limine*, and of exercising such jurisdiction after it has been acquired. As to the former, the conditions giving the municipality power to act at all must clearly be made to appear both as to subject matter and as to persons to be affected. In the instant case a proper construction of the charter of Seaside in its various forms discloses that the city has no jurisdiction over the subject matter of improving the county road in question. Pursuit of its prescribed formula for acquiring jurisdiction over persons in a scheme where it has charter power to act does not affect those persons in any matter over which it has no jurisdiction.

The state is yet the chief and principal manifestation of the governmental power of the people. All other agencies, including cities, are subordinate. A little leaven of charter power will not leaven the whole lump of jurisdiction, and until the county as the agency of the state constituted for that purpose through some recognized procedure has surrendered its authority over the county road, or there is some competent legislation on the subject, the city cannot assume control of it in excess of the powers granted.

The decree of the Circuit Court is affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON, J., concur.

HARRIS, J., concurs in the result.

Argued at Pendleton May 6, reversed with directions June 17, rehearing denied July 15, 1919.

HANLEY CO. v. HARNEY VALLEY IRR. DIST.

(180 Pac. 724; 182 Pac. 559.)

Notice—Irrigation District—Publication of Notice—Sufficiency of Affidavit of Publication.

1. Affidavit of publication of notice of petition for irrigation district by "foreman of the ———— tribune" was not sufficient compliance with Section 833, L. O. L., requiring such affidavit to be made by the printer of the newspaper or his foreman or principal clerk.

Notice—Organization of Irrigation District—Publication of Notice of Petition—Sufficiency of Affidavit.

2. Affidavit that notice of petition for organization of irrigation district was published "once a week for a period of four weeks beginning on the eighth day of August, 1917, and ending on the fifth day of September, 1917," was insufficient proof of compliance with Laws of 1917, page 744, Section 1, requiring such notice to be published "once each week for at least four successive weeks," since, under such affidavit, the publication would not necessarily have been made on four successive weeks.

Waters and Watercourses—Organization of Irrigation District—Publication of Petition—Jurisdictional Requirement.

3. Laws of 1917, page 744, Section 1, requiring publication of petition for organization of irrigation district once each week for at least four successive weeks before the time at which it is to be presented, is a jurisdictional requirement.

Waters and Watercourses—Organization of Irrigation District—Sufficiency of Petition.

4. Petition for organization of irrigation district under Laws of 1917, page 744, Section 1, *held* sufficient compliance with requirements of such statute.

Waters and Watercourses—Irrigation District—Petition—Qualification of Subscribers.

5. Petition for irrigation district is not required in view of Laws of 1917, page 744, Section 2, to enumerate the qualifications of subscribers under Section 29.

Waters and Watercourses—Irrigation District—Proceedings for Organization.

6. The same technical precision that is observed in a regular law action is not required in a proceeding for the organization of an irrigation district before the County Court.

Waters and Watercourses—Irrigation District—Proceedings for Organization—Order of Court on Final Hearing.

7. Under Laws of 1917, page 744, Section 2, as amended by Laws of 1919, page 442, providing that upon final hearing of petition for organization of irrigation district court shall make an order determining *inter alia* whether the requisite number of owners of the land within proposed district shall have petitioned for the formation thereof, such order should state all the facts found or determined by the court upon such hearing.

Appeal and Error—Review—Evidence—Exclusion of Land from Irrigation District.

8. Court's refusal to exclude land within proposed irrigation district from proposed district cannot be reviewed on appeal, in absence of the evidence upon such question.

Waters and Watercourses—Irrigation District—Exclusion of Land from District.

9. Upon petition for irrigation district and objection thereto by owner and requests to exclude land from proposed district, an issue is raised requiring proof of actual conditions existing before court can determine whether land should be excluded, in view of Laws of 1917, page 769, Section 37, subdivision (d).

[As to inclusion of land in irrigation district, see note in *Ann. Cas.* 1916A, 1222.]

PETITION FOR REHEARING.

Waters and Watercourses—Irrigation Districts—Proceedings for Organization—Order of County Court—Jurisdiction to Issue.

10. Where the proof of publication of notice of petition for irrigation district was defective in failing to show compliance with Laws of 1917, page 744, Section 1, requiring publication once each week for at least four successive weeks, and the County Court nevertheless proceeded with final hearing under Section 2, it would be the duty of the Circuit Court as upon a judicial examination of the proceedings as provided for in Section 41 to set aside the order of the County Court for want of jurisdiction.

From Harney: DALTON BIGGS, Judge.

In Banc.

This is an appeal by William Hanley Company from a decree of the Circuit Court, affirming an order of the County Court, organizing the Harney Valley Irrigation District Number 1, under the provision of Chapter 357 of the Gen. Laws of Oregon, 1917.

It is stated in substance in the briefs that Silvies River rises in the Blue Mountains on the south side of

Strawberry Mountain and flows in a southeasterly direction about 50 miles, where it enters Harney Valley proper and then continues for about 25 miles in a southeasterly direction across the valley, emptying into the north side of Malheur Lake in township 25 south, range 32½ E., W. M. About three miles below the point where it enters the valley the river divides into two forks known as the East Fork and the West Fork of Silvies River. The territory lying between these two forks of the river being commonly and locally designated as "The Island." Harney Valley is practically level, sloping gently to the south and east from Burns to Malheur Lake. Thousands of acres of the valley situated on "The Island" and along both forks of the river were naturally overflowed from the river in the spring and early summer months forming natural wild meadow lands and in places where the water is the deepest swamp grasses and tules grow in abundance. By individual systems of irrigation as well as by combined systems of irrigation, the owners of these lands from time to time during the last thirty years have controlled the natural flow of the waters of the river by means of dams erected in the river at various points, and canals and ditches leading therefrom, and have taken the waters out onto the higher ground, thereby making both classes of land produce abundant crops of wild hay. The appellant, William Hanley Company, for a great many years has been the owner of what is commonly called "Bell A" Ranch located about two and one half miles southeast of Burns, Oregon, and consisting of between 7,000 and 8,000 acres of land. These are practically wild meadow lands and grain lands, and lie on either side of the East Fork of Silvies River. Appellant asserts that:

"These lands have permanent, established and decreed water rights and have been for many years last past, and are now, thoroughly irrigated and reclaimed from the waters of Silvies River and each year grow abundant crops of natural wild meadow grass and grain, besides providing abundant pasture for stock after the crops are harvested. The system of irrigation has been built up from year to year by the construction of canals, ditches, dams and levees which completely distribute the water over the entire surface of the ground during the irrigating seasons."

The construction of this system cost not less than \$40,000.

In ordinary years there are grown on these lands from 6,000 to 8,000 tons of natural wild meadow hay. Approximately 3,600 acres of this irrigated land of appellant are included within the proposed land of the irrigation district. The record shows as follows: In August, 1917, 69 land owners signed and presented a petition to the County Court of Harney County, Oregon, proposing and asking for the formation of an irrigation district under the provisions of Chapter 357, Gen. Laws of Oregon, 1917. The petition is in substance as follows:

"We, the undersigned citizens of the United States, constituting a majority of the owners of land within the boundaries as hereinafter described, or who are *bona fide* claimants to unoccupied land under the laws of the United States, or of the State of Oregon, all being duly qualified electors under the law of the State of Oregon for organizing irrigation districts, being desirous of forming an irrigation district embracing the land hereinafter designated within the boundaries hereinafter described and set forth, and utilizing the waters of the Silvies River, Foley Slough and Poison Creek for the purpose of irrigation and the reclama-

tion of said lands, do hereby petition your Honorable Court as follows:

“That it is the purpose of the undersigned petitioners to organize an irrigation district under and by virtue of the irrigation district laws of the State of Oregon as recited in Chapter 357, General Laws of Oregon, 1917, providing for the organization and management of irrigation districts, and that your Honorable Court do proclaim a district as set forth herein; designating the name of said district; dividing said district into three subdivisions and defining the boundaries thereof, and that your Honorable Court proceed with such dispatch as may be under said law to call an election for the purposes above set forth and to do all things necessary under said law for the formation of said district, designating the time and places for voting at said election, and that the boundaries and description of land under said district shall be as follows, to-wit”:

Here follows a complete description of the boundaries of the land proposed to be embraced within the irrigation district containing in all 43,638.02 acres more or less according to the government surveys.

On the sixth day of September, 1917, the date mentioned in the petition on which the same would be presented to the County Court, the petitioners filed proof of publication of notice of petition, the substance of which is as follows:

“I, Bert Wheeldon, being first duly sworn, say I am foreman of the HARNEY COUNTY TRIBUNE, a weekly newspaper published at Burns, Harney County, State of Oregon, and of general circulation; and that the Notice of Petition for Irrigation District of which the annexed is a true and correct copy, was published in the HARNEY COUNTY TRIBUNE proper, and in the regular and entire issue thereof once a week for a period of four weeks, beginning on the 8th day of August, 1917, and ending on the 5th day of September, 1917,

and that the HARNEY COUNTY TRIBUNE was regularly issued and published during said period."

This was attached to the petition and notice as published. On October 4, 1917, appellant filed objections to the petition, describing its land which was included within the proposed boundaries of the irrigation district, and protesting against the organization of the district upon the following grounds:

"First, That none of the petitioners whose names appear on said petition is shown by said petition to possess the qualifications required of such petitioners;

"Second, That the petition is insufficient to give the Court jurisdiction to act in this proceeding;

"Third, That the publication of said petition and the notice of the hearing thereof were insufficient to give the Court jurisdiction herein."

And on the same date the William Hanley Company, by its attorneys, petitioned the County Court for the exclusion of its lands from the boundaries of the irrigation district for the following alleged reasons:

"That all of said lands have been for many years last past and now are fully and completely irrigated and reclaimed, and come under the classification of irrigated lands designated in the Act of 1917, Chapter 357 of the Laws of Oregon, providing for the organization of irrigation districts.

"That these lands hereinabove mentioned and described, now being fully irrigated and reclaimed, and having ancient and established and decreed water rights attached thereto, should not by right be included within the boundaries of said proposed irrigation district, and would be entitled to be excluded from the boundaries of said proposed irrigation district should the same be formed as petitioned for, in accordance with the provisions contained in Section 37 of said Act of 1917, Laws of Oregon.

"That the said lands hereinabove described have at the present time, and for many years last past have had, a complete system of irrigation and drainage, which system is applicable to the above described lands only, and that the said lands are not in any way whatever necessary to the formation or construction of said proposed irrigation district, or to any part thereof, and can be excluded therefrom without injury to the same."

And also averring that on September 22, 1917, at a meeting of the petitioners for the proposed irrigation district after a general discussion of the matter they voted unanimously to exclude appellant's lands from the district; and that the lands were included within the boundaries of the proposed district without the knowledge or consent of the Hanley Company; and praying that such lands be excluded from the boundaries of the proposed district. Objections to the organization of the district were filed which are not material upon this appeal. On the same date the County Court overruled the objections and made findings in the matter of the organization of the irrigation district in substance as follows:

"The court finds that the requisite number of owners of land within the proposed district have petitioned for the formation thereof, and it is hereby ordered that said petition herein presented contains the signatures of 50 and a majority of the *bona fide* land owners within the boundaries of the proposed district having the qualifications as defined in Section 29 of Chapter 357 of the General Laws of Oregon, 1917."

Whereupon the William Hanley Company appealed to the Circuit Court. At the time of the hearing in the Circuit Court on August 3, 1918, counsel for William Hanley Company and petitioners filed a stipulation of the following purport:

"It is hereby stipulated and agreed by and between counsel for the William Hanley Company and for the petitioners for the organization of the Harney Valley Irrigation District No. 1, as described in said petition, that more than 50 of the signers whose names appear on the petition filed in the County Court of Harney County, were at the time of signing said petition *bona fide* owners of one or more acres of land within the proposed boundaries of said district, whose names appeared on the assessment roll of said county for the preceding year, and were duly qualified petitioners under the statutes of Oregon providing for the organization of irrigation districts.

"Dated, Burns, Oregon, August 1st, 1918.

"LIONEL R. WEBSTER,

"C. H. LEONARD,

"Attorneys for William Hanley Company.

"C. A. SWEET,

"Attorney for Petitioners."

Whereupon the trial court affirmed the order of the County Court.

Appellant herein assigns the following errors:

"(1) The Court erred in holding that the petition was sufficient to give the County Court jurisdiction. (2) The court erred in holding that the proof of publication of notice was sufficient. (3) The court erred in not ordering the lands of appellant to be excluded from the boundary of the proposed irrigation district."

REVERSED WITH DIRECTIONS.

For appellant there was a brief over the names of Mr. C. H. Leonard and Messrs. Wood, Montague & Matthiessen, with an oral argument by Mr. Leonard.

For respondents there was a brief over the names of Mr. C. A. Sweet, Messrs. Hawley & Hawley and Mr. C. B. McConnell, with an oral argument by Mr. Sweet.

BEAN, J.—First considering the question of publication of the notice of the presentation of the petition we note that Section 1 of Chapter 357, Laws of Oregon, 1917, page 744, requires that in making application for the organization of an irrigation district pursuant to the provisions of this chapter,—

“such petition * * shall be published once each week for at least four successive weeks before the time at which the same is to be presented, in some newspaper printed and published in the county where said petition is presented, together with a notice stating the time of the meeting at which the petition will be presented. * * ”

1. Section 833, L. O. L., provides that proof of the publication of a notice required by law, or by an order of court or a judge, to be published in a newspaper, may be made by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the notice, specifying the times when and the paper in which the publication was made. A reference to the affidavit of publication discloses that the same was made by the foreman of the “Harney County Tribune,” the weekly newspaper in which the notice was published. This is not a compliance with the section of the statute referred to. The identical question here presented was involved in the case of *Jeffery v. Smith*, 63 Or. 514 (128 Pac. 822), in which this court, Mr. Justice MOORE writing the opinion, held that under Section 833, L. O. L., an affidavit of publication of notice made by the foreman of the “Evening Telegram,” a daily newspaper published in the City of Portland, is insufficient as against proper objection.

2, 3. The further objection to the proof of publication is that the affidavit shows that the notice of petition was published "once a week for a period of four weeks beginning on the eighth day of August, 1917, and ending on the fifth day of September, 1917," and that with four publications, one made on August 8th and one on September 5th, the publications would not necessarily be made on four successive weeks and that either three of the publications of the paper on the dates between August 8th and September 5th might not have contained the publication of the notice. The affidavit does not show that the publication was made "once each week," neither does it show that the publications were made for "four successive weeks." This is a jurisdictional requirement, and in order for the County Court to exercise authority in the matter of the organization of the irrigation district, it is necessary that Section 1, of Chapter 357, Gen. Laws of Oregon, 1917, be complied with in this respect and that proof thereof be made in conformity with the statute and incorporated in the record. The organization of such a district is of vast importance to the people directly interested, as well as to the public, in the promotion of irrigation, and it is essential that in order that the usual transactions of such an irrigation district such as the provisions for paying for a system of irrigation works, as issuing bonds and the like, should be in conformity with the mandate of the statute and not invalid. It is better that there shall be no grave question in regard to the formation of such a district which would tend to lessen the credit of the district.

The holding that the petition was sufficient is assigned as error. Section 1 of Chapter 357, Laws of 1917, enacts that:

“Whenever fifty or a majority of the owners of land irrigated or susceptible of irrigation desire to provide for the construction of works for the irrigation of the same, or desire to provide for the reconstruction, betterment, extension, purchase, operation or maintenance of works already constructed, or for the assumption as principal or guarantor of indebtedness on account of district lands to the United States under the Federal reclamation laws, they may propose the organization of an irrigation district under the provisions of this chapter by signing a petition therefor and presenting the same to the County Court of the county in which the land, or the greater portion thereof, is situated; said petition shall set forth and particularly describe the boundaries of the proposed irrigation district and shall state that it is the purpose of the petitioners to organize an irrigation district under the provisions of this Act, and shall pray that the same be organized hereunder. * * ”

4. By reading that portion of the petition set out above it will be seen that it conforms to this requirement of the statute. The petition is sufficient to confer jurisdiction upon the County Court if the same and the notice of the presentation thereof had been shown to have been published as required by law: *Herrett v. Warm Springs Irr. Dist.*, 86 Or. 343 (16 Pac. 609); *Links v. Anderson*, 86 Or. 508 (168 Pac. 605, 1182).

5, 6. It is the contention of the appellant that the petition should enumerate the qualification of the subscribers. The statute directs that such initiatory petition shall set forth and particularly describe the boundaries of the proposed irrigation district, and shall state that it is the purpose of the petitioners to organize an irrigation district under the provisions of this act, and shall pray that the same be organized hereunder. The statute does not require that all of

the qualifications of the subscribers should be declared therein. Section 2 of the Act directs that: On the final hearing the court shall make and enter an order determining, *inter alia* whether the requisite number of owners of the land within such proposed district shall have petitioned for the formation thereof, but all of such facts are not commanded by the law to be contained in the petition. The same technical precision that should be observed in a regular law action is not required in a proceeding for the organization of an irrigation district before the County Court. Section 29 of the Act of 1917 declares the qualification of voters. It directs that:

"The term 'owner of land,' or 'elector,' as used in this Act, shall include every person, male or female, over the age of twenty-one years, whether a resident of the district or State or not, who is a *bona fide* owner of one acre or more of land situated within the district and whose name appears on the last assessment roll, or who is the holder of an uncompleted title or contract to purchase State or Carey Act lands. Entry-men upon public lands of the United States shall be considered as landowners for the purpose of this Act, and shall be qualified petitioners for the organization of an irrigation district, and shall share all the privileges and obligations of landowners within the district, including the right to vote or hold office, subject to the terms of the Act of Congress entitled 'An Act to promote reclamation of arid lands,' approved August 11, 1916.

"Any corporation shall be entitled to vote as a single landowner through any officer or agent duly authorized in writing under the seal of the corporation. Any guardian, administrator or executor authorized to act as such of a person or estate owning land within the district shall be considered a landowner for the purposes of this Act, where the owner in fee is not otherwise entitled to vote."

This section points the way, in part at least, for the determination by the County Court of the qualifications of the petitioners, but the mandate of the legislature does not direct that all of these particulars should be contained in the petition. It might have been convenient for the County Court, if the petition had shown that the subscribers thereto each owned one acre of land within the district, as well as other particulars. We think that the question of the qualifications of the subscribers to the petition in this proceeding, as to the ownership of land, is set at rest by the stipulation of counsel for the interested parties quoted above.

7. However, in view of the future steps which may be taken in this matter, it may be proper to say that it would seem that all the facts found or determined by the County Court should be stated in the order made pursuant to Section 2 of this Chapter, which was amended by Laws of 1919, page 442, so that upon an examination of such proceedings an appellate court may see whether such facts are sufficient, and also so that the order of the County Court may plainly set forth the matter of which it is made evidence by virtue of the statute. For the County Court to order that a petition in such a matter contain the signatures of fifty and a majority of *bona fide* land owners within the boundaries of the proposed district "having the qualifications as defined in Section 29 of Chapter 357 of the Gen. Laws of Oregon, 1917," is to say the least a scant compliance with the statute. The record of the County Court should show the time and manner of the publication of the petition and notice.

It is urged by appellant that the court erred in not excluding its lands from the proposed irrigation dis-

trict; that the law contemplated the inclusion of arid lands only in such districts. Section 2 of the act provides that:

"When such petition is presented the county court shall hear the same and may adjourn such hearing from time to time, not exceeding four weeks in all, and on the final hearing may make such changes in the proposed boundaries as the court may find proper, and shall establish and define such boundaries," with certain provisions.

Under this section taken together with Section 37, appellant submits that it was the duty of the County Court upon petition therefor by the Hanley Company to exclude its lands from the irrigation district.

8. Whatever may be the law upon this point, the question of the exclusion of appellant's lands is not before us in this proceeding in a manner so that the same can be satisfactorily determined. It is true that a detailed and quite comprehensive statement in regard to appellant's lands and the manner in which they have heretofore been irrigated is contained in the briefs, but we search the record in vain to find any proof in regard to this important question. Before an appellate court can pass upon such a weighty matter, proof of the existing conditions should be made.

9. In proceedings of this kind the issues, if any, are raised in a general way. The petition is somewhat analogous to a complaint in a suit. The objections of the William Hanley Company and the request to exclude its lands from the district are in the nature of an answer to the petition and practically raise an issue. They are in effect in direct conflict with the petition, and in our view should be supported by proof of the actual conditions existing before the court can determine whether or not the lands should be excluded

from the district. This is in harmony with Section 37, subdivision d, of the act. The same principle applies to watering dry land as applies to the reclamation of swamp-lands. Some of the lands which might be beneficially included in an irrigation district might produce a light crop without irrigation, and also such lands might already be provided with facilities for a partial irrigation thereof by means of which they would produce one third or one half as much vegetation as when irrigated from the proposed system. As often stated, the proposed irrigation system might cause several blades of grass to grow where none grew before, or the proposed irrigation district might furnish means for irrigation in addition to the natural irrigation of such lands so that "two blades of grass" would grow "where only one grew before." Whether the lands of appellant are so conditioned is a question of fact which should appear in the record: *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112 (41 L. Ed. 369, 390, 17 Sup. Ct. Rep. 56). For the reason first indicated herein, the decree of the lower court is reversed, and the order of the County Court organizing and establishing the Harney Valley Irrigation District Number 1 as described in the petition is set aside and reversed, and this proceeding remanded to the Circuit Court with directions to remand the same to the County Court for such further proceedings as may be deemed proper not inconsistent with this opinion.

REVERSED WITH DIRECTIONS. REHEARING DENIED.

BURNETT, J., concurs in the result.

Denied July 15, 1919.

PETITION FOR REHEARING.

(182 Pac. 559.)

On petition for rehearing. DENIED.

Messrs. Hawley & Hawley and Mr. C. B. McConnell,
for the petition.

Mr. C. B. Leonard, contra.

In Banc.

BEAN, J.—10. The petition for rehearing suggests, that when this matter was before the County Court the objection was to the publication, and not to the proof of the publication; and that the same question was passed upon by the Circuit Court. Counsel for the irrigation district urge that due notice of the proceedings in this matter was given. It is asserted that the delay caused by setting aside the order of the County Court will work an injustice. We regret that there should be any loss of time in regard to a matter of so much importance. It was with this view that the matter was reversed in order that proper proceedings in the matter could be taken to correct the same, as shown in our former opinion.

The County Court is authorized to grant the petition of an irrigation district upon compliance with Section 1 of Chapter 357, Gen. Laws of Oregon, 1917. The above section requires, among other things, that such petition shall be published once each week for at least four successive weeks before the time at which the same is to be presented, in some newspaper printed

and published in the county where said petition is presented, together with a notice stating the time of the meeting at which the petition will be presented.

The only way in which the court can determine whether or not that part of the section has been complied with, and the required notice has been given is by the proof of the publication of such notice. The proof of the publication of the notice of the presentation of the petition in the matter of the organization of this irrigation district is admittedly defective and must be so considered. As the matter seemed to us upon the former consideration, and as we still look upon the same, when it is ascertained that the jurisdictional requirement of the statute has not been complied with, and the County Court was without authority to proceed with the final hearing mentioned in Section 2 of the act, there is no alternative for the court, except to set the order of the County Court aside. We fail to see the availability of the distinction attempted to be made between the "publication of the petition and the notice of hearing thereof," and the proof of such publication as the court can only determine what the publication was by the proof thereof. It was held by this court in *Rynearson v. Union County*, 54 Or. 181 (102 Pac. 785), that when it appears at any stage of the proceedings, upon the trial of a cause, that an inferior court has acted without jurisdiction, and the proceedings are subject to review, the duty devolves upon the court to set aside the proceedings, upon its own motion, and purge the record of informalities, and refuse to proceed further, though the defect has not been challenged in a formal way.

When we notice the provision in Section 41 of this Chapter for the institution of proceedings in the Cir-

cuit Court for the purpose of having a judicial examination and judgment as to the regularity and legality of the proceedings in connection with the organization of a district, and the proceedings of the board and of the district providing for, and authorizing the issue and sale of bonds of the district, it is at once apparent that where there has been a want of legal proof of the notice required by the statute in order to initiate the proceedings for the organization of such a district, that it is the duty of the court to set aside the attempted proceedings in order that steps be regularly taken for the presentation of such petition. This is for the best interest of all concerned.

Subdivision (b) of Section 41 of the act requires the court upon the hearing of such special proceedings to find and determine whether the notice of the filing of the petition has been duly given and published. It is stated in the brief that the proof of publication in this case was made on the regular printed form in general use by the newspapers in that county. It seems strange that at this late date a form of affidavit of publication should be in use in the office of a newspaper. Twenty-five years ago there might have been some reason for it. It is hoped the form will be changed.

Believing that if the irrigation district should continue its ordinary business, and the proceedings should come up for judicial examination hereafter, that the court would be compelled to hold that they were illegal as heretofore indicated, the petition for rehearing is denied. Under the circumstances of this case as disclosed by our former opinion, after further consideration, each party will be required to pay its own costs.

REVERSED WITH DIRECTIONS. REHEARING DENIED.

Argued September 24, 1918, affirmed February 11, rehearing denied July 15, 1919.

SWEENEY v. JACKSON COUNTY.*

(178 Pac. 365; 182 Pac. 380.)

Parties—Joinder—Complaint.

1. Whether there has been a proper joinder of parties defendant depends largely upon the case as stated by plaintiff in his complaint, however it may turn out upon the merits.

Courts—Jurisdiction—Answer to Merits.

2. Where defendant answers to the merits, court's jurisdiction over such defendant becomes complete.

Appearance—General Appearance After Special.

3. Trial of cause on merits after special appearance attacking jurisdiction of court is in effect a general appearance.

Venue—Action Against County—"Necessary Party."

4. Contractor's action on road building contract against county and bank to which contractor had assigned as collateral security amount due under pretended final estimate of county's indebtedness claimed by contractor to be erroneous, but which bank insisted could not be set aside to its prejudice, was properly brought in county in which bank was situated, though different from defendant county, under Section 396, subdivision 3, L. O. L.; the bank being a "necessary party" under Section 393.

Highways—Construction Contract—Conclusiveness of Engineer's Estimate.

5. Stipulation in road building contract that state highway engineer's estimate as to work done and value therefor to be paid by county is of essence of contract, and in absence of fraud or gross mistake implying bad faith or failure to exercise honest judgment is binding upon both parties as to disputes subsisting and open to arbitration.

Highways—Construction—State Highway Engineer's Estimate—Errors—Sufficiency of Evidence.

6. Evidence held to show such gross and palpable errors in classifying and estimating the amount of work performed under road building contract making state highway engineer's estimate final, that it was impossible for state highway engineer's final estimate to be the result of the exercise of honest judgment.

*For authorities discussing the question of conclusiveness as between municipality and contractor of decision of engineer or other empowered officers as to matters concerning contract for public improvement, see note in 23 L. R. A. (N. S.) 317. REPORTER.

Highways—Construction—State Highway Engineer's Estimate—Errors—Correction.

7. Where state highway engineer's final estimate of work performed under contract making such estimate final showed such gross and palpable errors that it was impossible for result to be the exercise of honest judgment, the estimate should be set aside and corrected.

Highways—Construction—Contractor's Compensation—Engineer's Estimate—Errors.

8. State highway engineer's estimate of work performed under contract making such estimate final is only *prima facie* correct, and where it appears that that estimate is not fair, and is result of reports of incompetent subordinates and not of an impartial hearing and determination, equity will set aside estimate and determine contractor's compensation.

Highways—Construction—Compensation of Contractor—Extra Work.

9. Where contract contemplated work to be performed during summer, but because of right of way complications contractor was required to postpone work until winter months and because thereof and by reason of change of plans was required to do considerable work not contemplated by contract, he could recover therefor under stipulation in contract providing for additional compensation for extra work.

Highways—Construction of Contract—"Earth"

10. The word "earth," within highway construction contract providing for contractor's compensation for removal thereof embraced clay, sand, loam, gravel and all hard material that can, in opinion of engineer, be reasonably plowed, and all earthy matter or earth containing loose stones or boulders intermixed and all other material that does not come under the classification of hard-pan, loose rock, solid rock, shell rock and solid rock borrow.

Highways—Construction of Contract—"Hard-pan."

11. The term "hard-pan," within road building contract providing for contractor's compensation for removal thereof, includes material, not loose or solid rock, that cannot in the opinion of the engineer be reasonably plowed on account of its own inherent hardness.

Highways—Construction of Contract—"Earth"—"Hard-pan"—"Adobe."

12. Where road building contract provides for compensation for removal of "earth" and "hard-pan" but not for "adobe," and where there was evidence that adobe could not be practically plowed or blasted out, adobe will not be classed as earth or hard-pan, and contractor will be given reasonable cost of excavating it.

ON PETITION FOR REHEARING.

Appeal and Error—Review—Determination.

13. Where plaintiff did not appeal in an equity case, the appellate court cannot increase the award in his favor even though it hears the case *de novo*.

Appeal and Error—Review—Determination.

14. Under Section 556, L. O. L., the appellate court hears an equity case *de novo*, and it may affirm the decree though it bases the affirmation on reasoning differing from that of the trial court.

Highways—Contracts—Action.

15. In an action by a highway contractor against a county, evidence held sufficient to establish his claim for additional compensation, etc.

From Multnomah: GEORGE N. DAVIS, Judge.

In Banc.

This is an appeal by the county of Jackson from a decree entered against it, in favor of the plaintiff John W. Sweeney in the sum of \$82,533.20. By the same decree, it is adjudged that the defendant United States National Bank is entitled to a lien on the sum awarded to the plaintiff Sweeney to the amount of \$39,996.50.

An outline of the facts leading up to the litigation is as follows: The county had sold bonds aggregating \$500,000 under the provisions of Chapter 103 of the Laws of 1913, for permanent road construction. By Section 24 of that act, the county was to prepare plans and specifications and invite bids in conformity with such plans and specifications. By Section 4 of Chapter 339 of the Laws of 1913, the state highway engineer was required to act in an advisory capacity to the County Court, and upon request was to furnish plans and specifications for road construction. On the third day of July, 1913, the County Court for Jackson County petitioned the state highway commission to make available to the court, the services of the state highway engineer under the provisions of said Chapter 339. On the twenty-first day of July, 1913, the highway commission, by resolution, directed the state highway engineer to aid said county in the planning,

locating and constructing a system of permanent roads within said county. Copies of these proceedings are in evidence, and may be seen on pages 21 and 22 of the First Annual Report of the Department, for the period ending November 30, 1914. Accordingly, the necessary surveys were made and plans and specifications placed on file in the office of the state highway commission and bids were advertised for the grading of approximately fourteen miles of the Pacific Highway in Jackson County, extending from the California-Oregon line, over the Siskiyou Mountains, down to within about seven miles of the City of Ashland, Oregon, in accordance with plans and specifications then on file with the Department. The notice to contractors was given, and the proposal of the plaintiff was accepted on the thirty-first day of January, 1914, and the resulting contract and specifications are contained in the record. The contract was a standard printed form, furnished by the state engineer.

The complaint alleges the corporate existence of the defendants county of Jackson and United States National Bank. It is then alleged that on January 31, 1914, the plaintiff and the defendant county entered into a contract in writing, which is attached to the complaint, by the terms of which the plaintiff undertook to construct a highway extending from the California line northward a distance of approximately 14 miles, but more particularly described in the contract as from engineer's Station 0+00 to Station 705+.086. The making of this contract is admitted. It is further alleged that the work and material to be performed and furnished was to be paid for by the county at certain prices named in the contract, and that for all work other than that covered by the contract the county

agreed to pay to the plaintiff force account prices as follows: For team, wagon and driver, \$7 per day; for common labor, \$3 per day; for gang foremen, \$6 per day; and in addition thereto the sum of 10 per cent (10%) of all sums so payable for such force account. This allegation of the complaint is admitted. That the work of construction commenced early in February, 1914, and was completed on or about March 28, 1915, but that during the performance of the work the county abandoned that portion of the highway shown on the plans, which were made a part of the contract between Stations 563 and 594, and relocated that portion of the highway and required the plaintiff to construct such relocated portion according to a new and different plan and by the terms of the contract the plaintiff was entitled to receive compensation for this work at force account prices, plus 10 per cent on the cost of labor. That under date of February 25, 1915, or more than a month before the work was completed, the state highway engineer made a certain pretended "Final Estimate" of the work performed and material furnished by the plaintiff. The allowances of this estimate are set out in detail in the complaint. The complaint further alleges that thereafter the state highway engineer made another and further estimate or allowance to the plaintiff in the sum of \$13,700, distributed as follows:

Extra for concrete culvert work at Stations	
674+90, 526+90, and 615+20.....	\$2,235
Extra work Siskiyou, Stations 392 to 398.....	950
Extra work Steinman overcrossing, Stations 563	
to 594.....	6,000
Extra work Dollarhide Crossing, Station 509..	2,000
Miscellaneous, covering all other bills and claims	
rendered by J. W. Sweeney.....	2,515

It is alleged that the plaintiff refused to accept the pretended estimate of the state highway engineer and protested to the defendant county that the estimate was unfair, incorrect and incomplete, and failed to include many items of work performed. That thereupon a special session of the County Court of Jackson County was held on March 20, 1915; that the plaintiff appeared before the court and protested against the pretended final estimate, and thereupon it was agreed that the estimate be set aside and that the County Court should appoint a disinterested civil engineer to reclassify and re-estimate the work performed and to determine the amount due to the plaintiff and that the county agreed to pay and the plaintiff agreed to accept the amount so to be ascertained, and that it was further agreed between the plaintiff and the county that the pretended final estimate should be held and retained by the plaintiff as a current or preliminary estimate. The complaint further alleges that the plaintiff had become indebted to the United States National Bank in a sum in excess of \$35,000, and the bank demanded that plaintiff assign to it as collateral security for such indebtedness the said pretended final estimate and the moneys due thereunder, which assignment was so made by the plaintiff on April 1, 1915. That thereafter the County Court of Jackson County undertook to rescind its agreement with the plaintiff to cause the work to be reclassified and re-estimated and refused to make any appointment of a disinterested civil engineer for that purpose and now claims and insists that the pretended final estimate is correct and truly represents the amount due to the plaintiff and that the defendant bank claims and insists that the pretended final estimate so assigned to the bank as a preliminary or current estimate is a final estimate under the contract. The complaint then sets out

twenty-one specific grounds upon which the alleged final estimate is not final or conclusive against the plaintiff and should be set aside, and alleges in detail the quantities of the different kinds of material moved under the contract and the amount of pipe, concrete and other material installed on account of which the plaintiff was entitled to receive payment at unit prices under the contract on the whole line, excepting that part between Stations 563 and 594, aggregating \$162,275.30.

The complaint then alleges that in the construction of that portion of the highway last above described, namely, on the entire line excepting that part between Stations 563 and 594, the plaintiff excavated 42,390.3 yards of material known as "adobe" or "sticky," for which there was no price fixed by the contract and for which plaintiff was entitled to receive a reasonable sum as compensation, which is alleged to be \$0.75 a cubic yard, or a total sum of \$31,792.72.

The complaint also sets out in detail the quantities of material moved and also the pipe and material placed and installed in structures on that part of the highway between Stations 563 and 594. This statement is as follows:

Items.	Quantities.
Hard-pan	2,133.4 cubic yards
Loose Rock.....	4,696.3 cubic yards
Solid Rock.....	5,037.6 cubic yards
"Doubie" or "Sticky".....	6,211.0 cubic yards
Overhaul	46,800.0 cubic yards
Riprap, hand placed.....	14.5 cubic yards
Clearing	593.8 square rods
Grubbing	60.2 square rods
Concrete Pipe, 12-in., in place...	186.0 lineal feet
Concrete Pipe, 24-in., in place...	93.0 lineal feet
Reinforcing Steel, in place.....	35,978.7 pounds
Concrete Masonry, Class A, in place	606.0 cubic yards

That the plaintiff was entitled to receive compensation for this work and material at force account prices in the sum of \$39,500.80. The complaint then alleges that the defendant county failed to furnish plaintiff proper stakes, elevations and directions for the construction of the "Dollardhide Crossing" over the tracks of the Oregon and California Railroad at Stations 509 and 510 and made such substantial changes in the location of the highway at this point and in the plans for the crossing that plaintiff was damaged in the sum of \$6,172. The complaint then alleges that between Stations 392 and 398 at a point known as Siskiyou Curve changes were made in the location and plans of the highway whereby plaintiff was delayed and sustained damage in the sum of \$804.

It is then alleged that at Stations 674+90, 526+90 and 615+20, the plaintiff put in place under the grade of the highway, strictly in accordance with the plans and directions of the highway engineer, certain concrete culvert pipe and that the plans of the engineer were defective and for this reason the pipe was crushed by the weight of the fill at these three points; that the engineer required the plaintiff to tunnel through the fill at these three points and construct protected concrete culverts and that the plaintiff is entitled to compensation for such work at force account prices in the sum of \$3,280.

The complaint then alleges that at various places along the line of the highway not before mentioned, the highway engineer made numerous substantial changes in location and plans and failed to furnish plaintiff proper stakes, elevations or directions for constructing the highway, and plaintiff was compelled to keep a large force of men on the ground at great expense; that at all points along the line of the high-

way the highway engineer set stakes indicating the elevation of the completed roadbed and these elevations were computed by the engineer with reference to a large number of bench marks which were in many cases erroneous and not in agreement and as a result plaintiff was required to change the grade of large portions of the highway after they had been completed in accordance with such stakes and on account of such work plaintiff is entitled to compensation at force account prices in the sum of \$15,344.25.

The complaint further alleges that after the roadbed had been completed in accordance with the plans and directions of the highway engineer and after the men and teams had been moved to other parts of the work the plaintiff was required to return to the roadbed so completed and reconstruct it so that at certain places the surface would be convex or "crowned," and at other places to raise one side of the roadbed to a greater elevation than the other, for all of which work there was no provision in the contract or plans and specifications; that plaintiff is entitled to compensation at force account prices for this work in the sum of \$5,799.75.

The complaint further alleges that plaintiff was required by the engineer to purchase and bring upon the work certain material which was not required in the construction of the highway at a cost including transportation of the sum of \$543.44.

The complaint further alleges that by the terms of the contract the defendant county was required to furnish through the highway engineer a complete, true and accurate profile map showing the location and grade elevations of the highway and the ground over which it was to be constructed; that no such profile was ever furnished as per the terms of the contract,

except a profile covering less than half of the highway, and this map was not furnished until long after the execution of the contract; that the county and its officers well knew that the ordinary and usual method of construction and the method in contemplation of the parties to the contract was by the employment of gangs of stationmen who would undertake at unit prices certain portions of the work to be allotted to them; that by reason of which plaintiff was unable to secure stationmen for a large portion of the work at unit prices, which were much less than the cost of doing the work by day labor; that plaintiff was compelled to do a large portion of the work by day labor which he could have let to stationmen and the difference in the cost and the amount of damage suffered by the failure of the county in this regard is \$12,000.

The complaint summarizes the claims of the plaintiff as follows: The amount which the plaintiff was and is entitled to receive from the defendant county is the sum of \$277,562.26, together with interest on all of the items set forth in the complaint, except those items claimed as damages, at the rate of 6 per cent per annum from March 28, 1915, less the amount paid by the county, namely, \$156,321.22, and less such sum as should be found to be the cost of cement furnished by the county to the plaintiff.

The defendant bank answered asserting that by virtue of the assignment of the amount due as stated in the final estimate of the engineer as collateral security, in any event the county of Jackson is indebted to this defendant in the sum of \$35,373.36, with interest, and that the county ought not to be allowed to allege that any less sum of money is due this defendant.

The defendant county appeared specially and moved the court to quash the service upon the county for the

reason that the same was void. That the suit was not brought where said defendant resides or was found, and the defendant United States National Bank of Portland, Oregon, is not a material or necessary party to the controversy, and that this court has no jurisdiction thereof, or over this defendant. The motion being overruled, the county demurred to plaintiff's complaint on the grounds of (1) lack of jurisdiction, (2) insufficiency of facts, (3) that the plaintiff has an adequate remedy at law. The county also demurred to the answer of the bank. The court overruled the demurrers. After demands by the county for a bill of items and the answers thereto, and a request for further items of amount, the defendant county answered the plaintiff's complaint, putting at issue the material allegations, specially answering each of the paragraphs of the complaint, and setting up the provisions of the contract, the issuance of the final estimate, the verification thereof by the oath of the plaintiff, the sale and transfer of such voucher from the plaintiff to the defendant bank, and an estoppel; and likewise, answered the answer of the bank, and the cause was put at issue.

The answer of the county avers *inter alia*:

"That by the terms of said contract and which is the contract above referred to in this further and separate answer, the state highway engineer referred to in said contract was required, on the completion of the work under said contract, to make a final estimate of the amount due the plaintiff. That by the terms of said contract said engineer was made an umpire whose decision upon said matter in said final estimate should be final and binding upon the parties to said contract."

The transcript of the evidence contains 2,400 pages of testimony.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Alfred E. Reames* and *Mr. George M. Roberts*, District Attorney, with an oral argument by *Mr. Reames*.

For plaintiff-respondent there was a brief over the names of *Mr. Loyal H. McCarthy*, *Mr. S. B. Huston*, *Mr. Robert D. Searcy* and *Messrs. Carey & Kerr*, with oral arguments by *Mr. McCarthy*, *Mr. Huston* and *Mr. James B. Kerr*.

For respondent, United States National Bank of Portland, there was a brief over the name of *Messrs. Chamberlain, Thomas, Kraemer & Humphreys*, with an oral argument by *Mr. Warren E. Thomas*.

BEAN, J.—The first question presented for consideration is in regard to the motion to quash, for the reason the suit was commenced in the wrong county. It is evident that the suit is embraced within that portion of Section 396, subdivision 3, L. O. L., which enacts that:

“In all other cases, the suit shall be commenced and tried in the county in which the defendants, or either of them, reside, or may be found at the commencement of the suit.”

The defendant bank is an institution of Multnomah County. This question therefore depends upon whether or not the bank was a necessary or proper party defendant. If it is, then the suit was properly commenced in Multnomah County. Section 393, L. O. L., which prescribes who may be plaintiffs and defendants, provides in part that:

“Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete

determination or settlement of the questions involved therein."

The record discloses that both the county and the bank claimed that the estimate of the amount due plaintiff was in fact final and was in the nature of an adjudication fixing the amount due the plaintiff from the county. The bank was the assignee of all of the interest of the plaintiff by virtue of the estimate. The bank insisted that the estimate could not be set aside to its prejudice; and the complaint prayed that notwithstanding the claim of the bank that a decree be entered fixing a new and correct estimate which should be paramount to any rights or claims of the bank under its assignment and that the bank be enjoined from asserting that the estimate was final and binding on the plaintiff. According to the claim made by the bank, it was the owner by virtue of the assignment as collateral security of the whole amount due Sweeney from plaintiff. Therefore, if this is correct, the bank would have had the right to have instituted an independent action upon the claim, and would not have been compelled to wait from April, 1915, until the present litigation is concluded. This interest of the bank in having the \$35,573.56 paid to it instead of having the claim assigned to it, declared to be an equitable assignment of only a portion of plaintiff's demand from the county, was wholly adverse to plaintiff's interest. In order that the bank should not commence such an independent action, and that all questions involved between the plaintiff and the county might be completely settled, it was necessary to make the bank a party to the suit. If the plaintiff had proceeded against the county alone, he would probably have been met at the inception of the litigation by an objection

that the bank, because of its assignment, was a necessary party. It is the policy of courts of equity that whenever a cause is presented¹ where judgment is sought upon a controversy between the parties before the court, to have all of the parties present, whose rights are so interwoven; whenever such parties can be brought in so as not to infringe upon the rights of those who are absent by a decree which would necessarily affect their interests, or if the presence of any such party would defeat the jurisdiction, then the court will dismiss the suit: *California v. Southern Pacific Co.*, 157 U. S. 229 (39 L. Ed. 683, 15 Sup. Ct. Rep. 591); *United States v. Northern Pacific R. R. Co.*, 134 Fed. 715 (67 C. C. A. 269). The demand of the plaintiff was that the alleged final estimate or award be declared to be only a partial or preliminary estimate. Under these circumstances, the bank claiming the assignment of an adjudicated claim was not a mere nominal party. If upon the trial, the final estimate should be set aside or declared not to be such a final estimate, the claim of the bank then would be in the same condition as any other preliminary estimate of unsettled account. The answer of the county to the answer of the bank denied any interest in the bank to protect and denied that the plaintiff had made any assignment to the bank, or that there was due the bank any sum whatever. The provisions of the decree, in so far as the bank is concerned, established the necessity for its presence, and that it had rights which were determined according to the contentions of plaintiff. According to the decree of the trial court, the transaction between the plaintiff and the bank operated as an equitable assignment of a part of the money due plaintiff. In the case of *Willard v. Bullen*, 41 Or. 25 (67 Pac. 924, 68 Pac. 422), Bullen had a contract with

the City of Portland to erect a bridge. He gave as collateral security, orders on the city to the Commercial National Bank, and others, some of which were "payable out of the final estimate," and others "payable out of the next estimate or payment due under the terms of the contract." These orders were presented to the city, but before they were paid, or a final settlement was made, suit was brought by plaintiff who claimed to be a partner of Bullen.

This court said:

"The orders in favor of the Commercial National Bank, The North Pacific Lumber Co., Kelly, Dunne & Co. and Jacobson operated as an equitable assignment of a part of the fund, and gave to these order claimants a prior right to be paid out of such fund before the general creditors."

As to an interest acquired by an equitable assignment: See *McDaniel v. Maxwell*, 21 Or. 202 (27 Pac. 952, 28 Am. St. Rep. 740). The rule adopted in this state in the latter case is that an assignment of a part of an entire demand is good in equity, and operates when delivered to the payee as an equitable assignment or appropriation of the fund *pro tanto*, and no acceptance by the drawee is necessary: Citing 3 Pomeroy's Equity, § 1280; *Brill v. Tuttle*, 81 N. Y. 454 (37 Am. Rep. 515); *First National Bank v. Kimberlands*, 16 W. Va. 555; *Harris County v. Campbell*, 68 Tex. 22 (3 S. W. 343, 2 Am. St. Rep. 467); *Hutchinson v. Simon*, 57 Miss. 628; *James v. City of Newton*, 142 Mass. 366 (8 N. E. 122, 56 Am. Rep. 692). In 4 Cyc. 103, the rule as to parties is stated as follows:

"When it appears in a proceeding in equity that the subject matter, or an interest therein, has been assigned, the assignee is a necessary party to the proceeding brought by the assignor, or against him."

1. In the determination as to whether or not there has been a proper joinder of parties defendant, it must depend largely upon the case as stated by the plaintiff in his complaint, however it may turn out upon the merits: *Rountree v. Mt. Hood R. Co.* (D. C.), 228 Fed. 1010. "The motive of the plaintiff," says the court in *Chicago, Rock Island & Pacific Ry. Co. v. Schwyhart*, 227 U. S. 184, 193 (57 L. Ed. 473, 33 Sup. Ct. Rep. 250, 251), "taken by itself does not affect the right to remove. He has an absolute right to enforce it whenever the reason makes him wish to assert the right."

The county bases its claim that the bank was not a necessary party upon decisions involving facts which are dissimilar to those in the present case. In *Allen v. Miller*, 11 Ohio St. 374, 376, cited by it, the question was as to whether the assignors of plaintiff who claimed no interest in the controversy adverse to plaintiff were necessary parties, and whether such assignors should be joined as defendants, the court held that they need not be so joined. In *Thompson v. Massie*, 41 Ohio St. 307, 317, relied upon by the county, it appeared that Thompson was sued as a joint maker of a note. It was objected that bankruptcy proceedings had been instituted against Thompson before the action was brought. The court held, nevertheless, that Thompson was the proper party to the action. In *Hadley v. Dunlap*, 10 Ohio St. 1, 6, cited by the county, it appeared that a resident who had no interest in the controversy was joined with a nonresident and it was held that this joinder did not prevent the removal of the case to the federal court. In *State ex rel. Jackson v. Bradley*, 193 Mo. 33 (91 S. W. 483, 485), also cited by the county on this point, H., J. and S. prosecuted an action as attorneys at law, and J. collected the fee;

H. sued J. to recover his share, and joined S. suing in the county where S. lived. The court said:

"The employment of Houts and Suddath, although for a contingent fee, was wholly independent of each other. H. neither has nor claims to have any rights against S., and *vice versa*."

Questions of public policy, which would prevent the county being sued in any other forum than its own, are urged. That by bringing the suit in Multnomah County, the expense of the trial was excessive and burdensome. Section 45, Subd. 4, L. O. L., provides for a change of the place of a trial on motion of either party to the action when it appears:

"That the convenience of witnesses and the parties would be promoted by such change."

There was no application for a change of the place of the trial of which we are advised, in so far as it appears at this stage of our investigation Multnomah County was a convenient forum for the witnesses and it does not appear that it increased the expenses of the parties.

2, 3. Many causes involving claims against counties in the State of Oregon have been tried in a court other than that of a defendant county: See *Weiss v. Board of County Commissioners of Jackson County*, 8 Or. 529, 9 Or. 470; *Rice v. Wallowa County*, 46 Or. 574 (81 Pac. 358); *Ridings v. Marion County*, 50 Or. 30 (91 Pac. 22); *Bailey v. Benton County*, 61 Or. 390 (111 Pac. 376, 122 Pac. 755); *Buttle v. Douglas County*, 87 Or. 105 (168 Pac. 1180). After the county made a special appearance and the preliminary motions and questions were disposed of, it answered to the merits, and in any event the jurisdiction of the court over the defendant county then became complete. A party cannot fight

his battle upon the merits without making a general appearance. The law will not allow a party to obtain the benefit of jurisdiction of the court if the decree is in his favor, and repudiate it when the result is adverse. As said in *Sealy v. California Lumber Co.*, 19 Or. 94, at page 97 (24 Pac. 197, at page 198):

"He ought to do one thing or the other—either fight it out on the line of his special appearance; or, if he appear and go to trial, accept its incidents and consequences": *Belknap v. Charlton*, 25 Or. 41 (34 Pac. 758); *Winter v. Union Packing Co.*, 51 Or. 97 (93 Pac. 930); *Jones v. Jones*, 59 Or. 308 (117 Pac. 414).

4. We find that the United States National Bank of Portland, Oregon, had a claim, or interest in the fund in controversy in this suit adverse to the plaintiff; that the bank was a necessary party to a complete determination of the questions involved in this suit, and that the action was properly commenced in Multnomah County where the bank was situated.

The county's demurrer to the complaint, on the ground that the matters alleged are not cognizable in equity, raises the next question. It is the position of counsel for the county that equity has no jurisdiction for the impeaching of an award, unless the contract, by the most explicit terms, makes the engineer selected by the parties the arbiter whose judgment is final, binding and conclusive upon both parties; nor unless fraud in making the award, which was participated in by the county, is alleged and proved; nor unless the error or mistake plainly appears upon the face of the award. That the plaintiff is precluded from obtaining relief by making an assignment to the bank, and thereby accepting benefits of the award.

The provisions of this contract relating to the finality of the award of the state engineer are as follows:

"All of said work is to be done under the supervision and direction of the engineer selected by the State Highway Engineer. To be approved by him and accepted by said State Highway Engineer. Said State Highway Engineer shall have the right to fully decide on all questions arising as to the proper performance of said work, and in case of improper construction, or noncompliance with the contract in any manner, to suspend said work at any time, and to order the partial or entire reconstruction of said work, or declare the contract forfeited; and in case of forfeiture, to relet said contract and to adjust any difference of price, or the damage, if any there be, which said party of the second part shall pay to Jackson County, Oregon, on account thereof, and in all such matters the decision of said State Highway Engineer shall be final. * *

"The State Highway Engineer shall, as soon as practicable after the completion of this contract, make a final estimate of the amount of work done thereunder, and the value of such work, and Jackson County shall, at the expiration of thirty-five (35) days from and after such final estimate is to be made, and is approved by the County Court of Jackson County, pay the entire sum so found to be due hereunder, after deducting therefrom all previous payments and all amounts to retained under the provisions of this contract."

Upon the trial counsel for the county moved for a decree under Section 411, L. O. L., for the reason that the plaintiff is not entitled to the relief claimed. All of these questions thus raised are so closely allied to the determination on the merits that we pause here to read the record.

5. Having carefully read all of the testimony in the case, the next question that we deem it our duty to give our consideration is whether or not a court of equity will exercise its jurisdiction to set aside the final certificate made by the engineer, or what may be

termed an award. A construction contract, such as the one in question in this case, which stipulates that a certain engineer is expressly clothed with the broad authority to determine all questions arising in relation to the work, and in case of improper construction or failure to comply with the contract, to suspend the work and order the partial or entire reconstruction, or to declare the contract forfeited, and in case of forfeiture, to relet the contract and adjust any difference of price, or the damage, if any, to the county on account thereof; providing that "in all such matters, the decision of said State Highway Engineer shall be final"; further providing that the engineer, after the completion of the work shall make a final estimate of the amount of work done, and the value thereof to be paid by the county; determine all disputes arising under the contract bearing upon the final settlement, and for payments to be made upon the engineer's certificate, does not create a mere naked agreement to submit difference to arbitration. Such stipulations for arbitration are not merely collateral, but are of the very essence of the contract, and such agreement is not subject to revocation by either party, and an award made by virtue of such contract provisions, and evidenced by final certificate of the engineer, in the absence of fraud or of such gross mistake as would imply bad faith or a failure to exercise honest judgment, is binding upon both parties to the contract, in so far as it is confined to disputes actually subsisting and open to arbitration. This is now well settled beyond controversy: *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 166 Fed. 403, 405 (93 C. C. A. 162); *Kihlberg v. United States*, 97 U. S. 398 (24 L. Ed. 1106); *Sweeney v. United States*, 109 U. S. 618 (27 L. Ed. 1053, 3 Sup. Ct. Rep. 344); *Railroad v. Central*

Lumber etc. Co., 95 Tenn. 538 (32 S. W. 635); *St. Paul & N. P. Ry. Co. v. Bradbury*, 42 Minn. 222, 227 (44 N. W. 1). In *Mundy v. Louisville & N. R. Co.*, 67 Fed., at page 637 (14 C. C. A., at page 587). Judge TAFT expresses the rule as to the finality of the arbitrator's decision thus:

"The authorities leave no doubt that construction contracts, in which the contractor stipulates that the engineer or architect of the owner shall finally and conclusively decide, as between him and the owner, what amount of work has been done, and its character, and the amount to be paid therefor under the contract, are legal and should be enforced. In such cases, after the work has been done, the contractor can recover nothing in excess of the amount found due by the engineer, unless he can make it appear that the engineer's decision was fraudulently made, or was founded on palpable mistake."

In *Lewis v. Chicago, S. F. & C. Ry. Co.* (C. C.), 49 Fed. 708, 710, the rule is stated as follows:

"The estimate may be impeached for fraud; that is to say, it may be shown that the engineers in charge intentionally underestimated or overestimated the work. It may also be impeached by proof of gross errors in the measurements and calculations. If the evidence shows such errors, it either creates the presumption of fraud, or warrants the conclusion that the engineers did not exercise that degree of care, skill and good faith in the discharge of their duty which the law exacts; and in either event the court will disregard the estimate so far as is necessary to do substantial justice."

See, also, *Elliott v. Missouri, K. & T. Ry. Co.*, 74 Fed. 707 (21 C. C. A. 3); *Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co.* (C. C.), 40 Fed. 465, 468.

In the case at bar, it is not claimed by plaintiff that there was any intentional fraud on the part of the

county or its engineers, but that in estimating the amount of the work performed, and classifying the same, there was such gross and palpable errors that it was impossible for the result to be the exercise of an honest judgment. Therefore the same is not binding.

6. The evidence in this case clearly shows that such mistakes were made by the force of assistants under the engineer. The testimony in the case is entirely too lengthy to be portrayed here. It is only fair to say that it is not the intention to in any way criticise the state highway engineer. The difficulty appears to be, and this county is not alone in the matter, that the county after the contract was awarded to the plaintiff placed too much reliance and responsibility upon the state highway engineer without provision being made for a sufficient corps of assistants. The state highway engineer's time and attention were demanded in various counties of the state; the real work of engineering devolved upon the district engineer who was in the office most of the time, and the engineer's work upon the road devolved upon another who in turn was compelled to rely for assistance upon men who were not thoroughly competent engineers, and did not understand the use of ordinary engineering instruments.

Having made this explanation, a general description of the method of procedure must suffice. Plaintiff Sweeney, after executing the contract, proceeded to the scene of the works with a crew of men and his construction outfit. In about three weeks, an engineer appeared. In the meantime the contractor was compelled to use all of his force in clearing the right of way without commencing actual construction. Engineering work for the construction of the road and the profiles for the work were far behind what they should have been at the time of the commencing of

the work; there was no complete survey of the line, and the location was done piecemeal, part from the north, part from the south and part from intermediate points, and at the places where these survey lines met it was necessary to resort to equations. The work of construction was practically dragging upon the heels of the engineering work, waiting for the surveys and the setting of grade stakes, and as a result there were many delays in the work, and many changes made in the plans which necessitated changes in the construction. In several places on the line of the fourteen miles of the road the location of the route was changed by means of offsets, 3.15 miles of which were made. Many changes were made from the partially completed profiles, for instance on one curve, the line was changed so as to increase the distance 16 per cent. Yet as we understand the record, the several estimates which went to make up the final estimate on March 29, 1915, were based upon and figured from the profiles without taking into consideration the changes that had been made. By the final estimate, the plaintiff was allowed a balance of \$35,573.56. The plaintiff protested against the allowance as shown by the final estimate, and filed such protest with the County Court of Jackson County giving many reasons therefor in detail, and claiming a balance of \$82,986.11, for the work upon the highway. The final estimate was signed by plaintiff under protest. There was never an acceptance of the final estimate by Sweeney in settlement or satisfaction of his demand against the county. The assignment by Sweeney of the amount allowed to the bank as collateral security was only a partial assignment of his claim against the county. It was an equitable assignment. The defendant county was not prejudiced thereby in any manner. The inter-

est of the bank can be appropriately adjusted and protected in a suit in equity. An action at law would not afford an adequate remedy.

7. We attach no particular significance to the fact that plaintiff verified the final certificate by a statement to the effect "that the work was actually performed and the material furnished as therein charged"; and there is due according to the contractor the sum of \$35,573.56, and that the same has not been paid. This verification is in no way inconsistent with plaintiff's claim in this suit. He not only claims the amount stated in the final certificate, but considerably more. This did not change the nature of the final certificate. On account of the various errors entering into the final adjustment indicating a want of the exercise of that degree of care, skill and good faith which the law exacts under the rule stated by the authorities above noted, and many more which might be added, the final estimate should be set aside and corrected.

8. The contract for the construction of the highway named the state highway engineer with reference to his official position. It is shown by the evidence that the final estimate signed by that official did not represent his judgment as to the amount of work performed or the classification thereof, but was based wholly upon reports from his subordinates. The contract gave to the state highway engineer the power of naming those subordinates. No provision appears to have been made for any hearing before the highway engineer or before his assistants; none appears to have been had except the rather summary proceeding when Mr. Bowlby devoted about two hours to the examination of some 2,000 force bills. A fair basis for the estimate or award on account of the many inaccuracies and mistakes shown by the testimony was lacking.

The proceedings and grounds were wanting which give to an ordinary common-law arbitration and award its binding effect. The final estimate assailed in this suit is merely *prima facie* correct. The duty of a court of equity as in all such cases is to so decide as to mete out substantial justice, and if upon all the evidence it appears that the estimate is not fair, that the plaintiff has not enjoyed the privilege every man is entitled, to, namely, an impartial hearing and determination, but that it appears as in this case that the estimate is based upon reports of incompetent subordinates and is grossly erroneous, then it is the duty of the court to set aside the final estimate and institute an independent inquiry as to the amount of compensation which the plaintiff has earned, and is justly entitled to under the contract. The testimony in the case is ample to bring the same within the requirements of the authorities above referred to. The plaintiff failing to obtain a satisfactory settlement with the defendant county solicited the services of G. A. Kyle an eminent and experienced engineer who took to his assistance Harry Kyle and Douglas Kyle, two other experienced engineers, and also other assistants, and obtained the data available to assist them from the county engineers, particularly a copy of the cross-section book of the survey made by the county engineers with the engineer's notes, and cross-sectioned a large part of the work taking the center of the road as constructed for the center line, and made many remeasurements; calculated the amount of material removed and work done the entire length of the road, except where force account was claimed, and also made a reclassification of the material so moved. In doing this, the testimony shows that they found about 90 per cent of the stakes which had been set by the county engineers, and many

bench-marks. They devoted about 48 days, May 23 to July 10, 1915, in the prosecution of this work. They also had the assistance of a competent and experienced engineer, Mr. H. S. Houston, in the reclassification of the material. All of these engineers testified upon the trial, giving the result of their investigation.

The total yardage not including the work designated as the

Steinman crossing being.....	274,173.90 cubic yards
The total number of cubic yards	
of the excavation as shown	
by the county engineers	
was	257,469.89

The amount of estimate of Kyle
and Houston being..... 16,704.01

—in excess of the total yardage allowed by the county engineers.

The trial court set aside the award made by the highway engineer and adopted the amount of excavation as fixed by the engineers for the county, and adopted the classification of the material excavated as estimated by the plaintiff's engineers. Taking the Kyle and Houston estimate of the total without disturbing the figures of the other classifications and computing the same as common excavation at the price thereof, 29 cents per cubic yard, makes \$4,844.16, which should be allowed plaintiff in addition to the amount allowed by the trial court.

The county employed a skilled engineer to examine the highway and in company with the resident highway engineer devoted two days in checking the classification that had been made by the resident highway engineer. This was about two years after the completion of the work, and at a time when several sec-

tions of the road were covered with snow, and it was impossible for the engineers to make definite calculation as a basis. The lists and tables made by Kyle and Houston and their assistants were checked and tested by the skilled engineers employed by the county, and one error was found in the computation of a cross-section amounting to about 4 per cent. The test so made stabilizes the Kyle and Houston estimates. For delays and changes in the construction of the highway necessitated and required by the county engineers other than those allowed by the lower court, the evidence strongly sustains the complaint as found by the trial court, and in addition thereto much more than the amount here allowed. The interest on the amount found due is disallowed for the time prior to the date of the decree of the lower court under the rule announced in *Sargent v. American Bank and Trust Co.*, 80 Or. 16, 39 (154 Pac. 759, 156 Pac. 431). The plaintiff did not perfect an appeal. In support of such allowance here made, let us take a small portion of the testimony as a sample, for instance, that relating to the Dollarhide Overhead bridge crossing the railroad. A statement prepared from the daily labor and material reports showing the approximate cost of this bridge is as follows:

Labor	\$5,139.10	
Teams	2,478.38	\$ 7,617.48
Ten per cent.		761.75
Material		7,074.88
		<hr/>
Total		\$15,454.11
Allowed on estimate (K. and H.).		9,282.61
		<hr/>
Leaving a balance.....		\$ 6,171.50

The difficulties encountered by plaintiff in the construction of this bridge are detailed about as follows: The construction was commenced on May 11, 1914, and it required until November to complete it. After its completion the railing built according to the plans failed and it was necessary for plaintiff to return and construct a new railing. At the beginning, the engineers failed to give the final depth of excavation and plaintiff was required to continue the excavation for the abutments and piers after the depth first designated was reached. The location of the piers was changed twice before completion. After the east abutment was well under way a general change was ordered and the angle or "skew" as called by the witnesses, at which the bridge crossed the railroad was changed. Lumber was brought upon the ground and some of the forms were constructed and put in place and the pouring of concrete was undertaken when the whole plan of the bridge was changed. The center span being lengthened three feet and the other spans shortened. When the forms were built in accordance with the revised plan there were no details for the girders and beams, and after these were furnished another change was made. Plaintiff was directed by the county engineer to: "Add one inch to length of each girder on account of 6 per cent grade." After the bridge was well along toward completion it was discovered that insufficient clearance over the railroad tracks was afforded and it became necessary therefore to change the girders. On October 7, 1914, the contractor was required to change a girder by cutting 11 inches, and the other girders were also changed. These changes necessarily resulted in delays and expense and the change in the form of the structure materially affected

the kind and quantity of material to be used. The angle at which the bridge crossed the track was made more obtuse and this naturally lengthened the structure and the increase of lateral clearance on the center span resulted in changes in material, bills for which had been made up in accordance with the original plan. The changes required more material and also the cutting of the steel in lengths to conform to such changes. The girders, weakened by the change in order to give greater vertical clearance, required additional reinforcement. The steel in the piers had to be spliced. A reinforced concrete railing on both sides of the bridge was called for. The specification for such reinforcement consisted of wire only one eighth of an inch in diameter. The plaintiff's foreman protested against this as insufficient, but the plans were followed with the result that the vibration from passing trains cracked the railing and necessitated its being rebuilt. Plaintiff was not furnished with sufficient plans. The only plan of the bridge actually constructed as stated by Mr. Bennett, county engineer on the work (page 2213), was prepared after the bridge was completed. The county engineers allowed extra for this bridge, \$2,000, which the trial court approved. We think to this should be added \$3,622.84, as additional damages on the Dollarhide bridge, being a portion of the balance of the actual cost which should be allowed plaintiff for this bridge and other similar delays claimed in the complaint for which no provision has been made, making the revised estimate of the court as follows:

	Total.	Steinman Sec.	Final.	Unit Prices.	Amount.
Earth, cu. yds.....	21,427.82		21,427.82	@ .29	\$6,214.06
Hard-pan, cu. yds.....	55,568.90	1,367.7	54,199.20	@ .35	18,969.71
Loose Rock, cu. yds.....	70,357.04	3,240.7	67,116.34	@ .38	25,504.20
Solid Rock, cu. yds.....	98,655.01	3,901.4	94,753.61	@ .78	73,907.82
Adobe, cu. yds.....	42,785.93	6,109.0	36,676.93	@ .75	27,507.69
Clearing, sq. rds.....	16,146.40	593.8	15,552.60	@ .50	7,776.30
Grubbing, sq. rds.....	4,067.60	60.2	4,007.40	@ 1.40	5,610.36
Riprap, loose, cu. yds.....	2.00		2.00	@ 1.00	2.00
Riprap, h'd-placed yds.....	141.20	14.5	126.7	@ 1.50	190.05
Overhaul, cu. yds.....	106,791.00	48,800.0	59,991.0	@ .01	599.91
Bubble masonry, cu. yds.....	144.70		144.70	@ 8.00	1,157.60
Concrete, Class A. yds.....	1,519.88	606.0	913.88	@ 11.00	10,052.68
Concrete, Class C. yds.....	111.13		111.13	@ 10.00	1,111.30
Reinforced Steel, in place, lbs.....	89,523.34	35,978.7	53,544.64	@ .06	3,212.69
Porous Tile in place, 4-in., lin. ft.....	467.00		467.00	@ .15	70.05
Con. Cul. pipe in place, 12-inch, lin. ft.....	4,472.00	186.0	4,286.00	@ .72	3,085.92
Corr. Iron pipe in place, 12-inch, lin. ft.....	1,741.00		1,741.00	@ 1.05	1,828.05
Con. Cul. pipe in place, 24-inch, lin. ft.....	887.00	93.0	794.00	@ 2.00	1,588.00
Damages—Dollarhide and other delays.....					6,622.84
Damages—Siskiyou Curve.....					803.95
Steinman Section—Force Account.....					39,550.80
Three broken culverts—Force Account.....					3,280.00
Misc. Force Account, \$7,348.99 less \$908.90 on Steinman Section.....					6,440.09
Material not used.....					543.44
Less cement.....					\$244,629.51
					5,775.09
Paid					\$238,854.42
Balance due					156,321.22
					\$ 82,533.20

—with interest at the rate of 6 per cent per annum from April 27, 1917, until paid.

9. Plaintiff claimed and was allowed compensation at force account prices for the work between Stations 563 and 594, known as the Steinman Section, and the defendant county complains. We do not understand that any serious controversy exists with respect to the facts relating to this portion of the work. The testimony shows that as to the grading no opportunity was afforded plaintiff to perform the same according to his contract during the summer months of 1914, when the work was contemplated to be done. The line of these sections of the highway was located adjacent to the right of way of the railroad company and during the whole of the summer a controversy was waged with the company as to the extent to which an encroachment would be permitted on the right of way. On July 31st, Mr. Bennett wrote to Mr. Sweeney advising him that they had agreed to discontinue all work on the S. P. right of way for a week or ten days, until the railroad engineers could prepare and forward maps and plans showing what part of their right of way they would allow the county to use. About October 11th, they started in to relocate the line of the highway, but there was a relocation after that. Mr. Bennett, the county engineer, said (see page 1192) that there were three or four changes between these stations; changes in the grade and numerous culvert changes were made between these stations so that it was not possible for plaintiff to undertake this work until in the month of October. The first plan of the bridge was dated 1913, and called for only two spans, the constructed bridge consists of three spans. The style of the bridge was not determined until October

8, 1914, when a plan was delivered to plaintiff which appears to be insufficient as a working plan. The estimate in the contract of Class "A" concrete was 593 cubic yards, while the final estimate shows 1,519.88 yards. By the county requiring the grading to be done in the winter months, disastrous results were caused. It was necessary to move 6,211 yards of adobe according to the estimate between these stations, and it is agreed that it is practically impossible to move this material during the rainy season. The grading between these stations could not be finished until the bridge was complete, as part of the material excavated had to be hauled from the north side of the bridge to make a fill on the south side. The same mistake, as to clearance, appears to have been made in the plan for the Steinman bridge that was made by the engineers on the Dollarhide bridge. Owing to delays on the Steinman bridge in mixing and pouring the concrete in freezing weather, elaborate precautions had to be taken to prevent damage from frost. This was required by the county engineers. It appears that it was necessary for the plaintiff to heat the water and the gravel and maintain a watchman to keep the fires going as a protection against frost. The contract required the work to be completed September 1, 1914, but the right of way between these stations was not secured, nor the plans of the bridge furnished until about five weeks after that date. The changes in this bridge were so radical that it cannot be successfully maintained that such a structure as completed was within the contemplation of the parties when they made the contract: 9 C. J., § 73, p. 734. See *Hayden v. Astoria*, 74 Or. 525 (145 Pac. 1072). A similar situation as is here presented was before the court in

Indianapolis Northern Traction Co. v. Brennan, 174 Ind. 1, 24 (87 N. E. 215, 223, 30 L. R. A. (N. S.) 85). The court there said:

"The contract under which they were obligated required that all of the work which they had contracted to perform should be completed by August 15, 1903. Certainly, when appellant company obligated these parties to do and finish the work within a fixed period, it was its duty to afford them a fair and reasonable opportunity to begin and complete the work; or, in other words, under the mutual contract entered into between it and them, it became its duty to furnish the required material, secure the right of way, and have the road grade in readiness, as required by the contract, so that appellees, in the exercise of reasonable diligence, might begin and finish the work within the prescribed period without being subjected to unreasonable cost or expenses on account of the default, delays, and hindrance of appellant. Its default or failure in these respects would subject it to liability for whatever damages appellees might reasonably sustain on that account. * * " Citing "*French v. Cunningham*, 149 Ind. 632, 637 (49 N. E. 797), and authorities there cited; *Louisville etc. R. Co. v. Donnegan*, 111 Ind. 179 (12 N. E. 153); *Lewis v. Atlas etc., Co.*, 61 Mo. 534; *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497 (42 N. W. 356, 4 L. R. A. 202); *Mississippi River Logging Co. v. Robson*, 69 Fed. 773 (16 C. C. A. 400)."

See, also, *Salt Lake City v. Smith*, 104 Fed. 457 (43 C. C. A. 637).

The contract in question in the present case stipulates in regard to extra work as follows:

"The contractor shall do such extra work and furnish such materials as may be required by the State Highway Engineer for the proper completion or construction of the whole work herein contemplated; * * The contractor shall receive for such extra work the actual cost of all materials furnished by him as shown

by his paid vouchers. For such labor and teams as are necessary he shall receive the current prices in the locality, which shall have been agreed to in writing by the engineer and by the contractor, plus ten (10) per cent."

By this stipulation the parties fixed a certain rate of payment for extra work of this character, thus avoiding the question as to "reasonable value." This construction of the contract by the parties is borne out in making and receiving payment at force account prices for similar extra work as that performed between Stations 563 and 594. The proof sustains the claim made by plaintiff both as to material and labor. The bridge as constructed and the work done between these stations was entirely different from that contemplated by the contract in the first instance. The stipulation made a part of the contract that the state highway engineer during the progress of the work might by giving written notice to the contractor, alter any of the *details* of the construction in any manner that might be found expedient or suitable without invalidating the contract, relates as the language suggests to details, or proportionally small changes as when necessary to the construction of the contemplated bridge, and not to an entire change of the plan or time for the construction thereof. The stipulation in the contract that:

"The contractor shall receive for such extra work the actual cost of all materials furnished by him as shown by his paid vouchers. For such labor and teams as are necessary he shall receive the current prices in the locality, which shall have been previously agreed to in writing by the Engineer and by the contractor, plus ten (10) per cent"

—makes applicable the agreement made by the parties

in regard to force-account prices above quoted. The contract having provided for such a contingency, it is unnecessary to resort to proof of the reasonable value of the work. We approve the finding of the trial court as to the allowance of the work on the Steinman section.

The contractor furnished to the agents of the county statements of the force account work claimed by him, substantially as provided for in the contract. Some of these claims were allowed by the county engineers. The plaintiff was not at all times informed as to what items were allowed and what were disallowed, so that when the defendant county demanded of plaintiff a statement of the various items claimed by him, its agents were in possession of the same detailed information or more than plaintiff. Therefore, it was not erroneous for the trial court to deny an order requiring a further presentation of such items under the circumstances of this case. As the trial of the case progressed, counsel for the defendant county were furnished with the various lists of estimates and information as to the surveys and engineering work of the plaintiff's engineers, and were permitted access to the books of account and other records of plaintiff so as to facilitate a fair trial of the cause.

In the construction of the highway, the plaintiff encountered material known as "adobe," "gumbo," or "sticky," which it is claimed on his behalf was not covered by the contract and should be paid for on a basis of a reasonable value, under the rule in *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1 (87 N. E. 215, 228, 90 N. E. 65, 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85); *Holm v. Chicago, M. & P. S. Ry. Co.*, 59 Wash. 293 (109 Pac. 799).

10. The determination of this question depends upon the classifications made in the contract. The material mentioned in the contract is comprised under the heads Earth, Hard-pan, Loose Rock, Solid Rock, Shell Rock and Solid Rock Borrow. Earth will include clay, sand, loam, gravel and all hard material that can, in the opinion of the engineer, be reasonably plowed, and all earthy matter or earth containing loose stones or boulders intermixed, and all other material that does not come under the classification of hard-pan, loose rock, solid rock, shell rock and solid rock borrow.

11. "Hard-pan" will include material, not loose or solid rock, that cannot, in the opinion of the engineer be reasonably plowed, on account of its own inherent hardness. It is the position of the engineers of the county that adobe comes within the classification of "earth" according to the contract, but in the allowance of accounts a portion of this material was classified as hard-pan.

12. It is shown by the evidence that adobe cannot be reasonably plowed. This would seem to bar it from the classification of earth. Strictly speaking, of course, it is part of the earth, but it appears to us that in the printing of the contract, and the execution of the same, this class of material was not within the contemplation of the contracting parties, and was not provided for by the terms of the contract. When we take into consideration that in the Siskiyou Mountains where this road is located, there are many kinds of material encountered, such as lava formation, it is not at all strange that the provision should have been omitted from the contract. Neither does the "gumbo" come within the specification of hard-pan which "on account of its own inherent hardness" cannot be

plowed. It appears from the evidence that adobe in its natural state cannot be successfully blasted or plowed, but to use the description given it had to be "dug out" as best it could be. It is shown that during the wet season it is very difficult to handle adobe on account of its being so sticky, and when it has dried it is nearly as hard as rock, and that a reasonable compensation for excavation of this material is seventy-five cents per cubic yard. The plaintiff having contracted to construct the highway which necessitated the excavation of the material known as adobe, and no price being agreed upon therefor, the law fixed the price at its reasonable value. It appears to have been partially conceded by the engineers for the county that adobe was not provided for by the contract by a portion of this material being classified as hard-pan. This was not an equitable classification, the unit price of hard-pan being less than one half the actual cost of moving adobe. While it may not be impossible to plow adobe, the testimony clearly shows that it is not practicable to do so. In *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1 (87 N. E. 215, 228, 90 N. E. 65, 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85), the court in considering the contract specifications said:

"The term 'plowed' was certainly used in its usual meaning, and must have been so understood by the parties. They did not mean or intend thereby the mere 'rooting-up' of the material or cutting a very shallow furrow, or such plowing as would require men to ride upon the whiffletree and upon the plow beam in order to keep the nose of the plow in the material which was attempted to be plowed."

This language is particularly applicable to the material in question as described by the witnesses. The

finding of the trial court in this respect was reasonable and equitable, and we approve the same.

As to the correctness of the final estimate as the determination of the quantities and kinds of material to which the unit prices fixed by the contract were applicable, it seems plain that unless Mr. Bowlby, the highway engineer, and Mr. Kittredge, his assistant, had reliable data to determine quantity and classification, the estimate must of course lose the benefit of any presumption in its favor. The contract provides that "all grading shall be done and estimated by the cubic yard." The obvious purpose of this provision was to insure payment to the contractor for the actual quantities and not for any theoretical quantities excavated by him. The measurements of the county engineers were largely the theoretical contents of the road prism as it was expected the excavation would take place. The lateral lines of the excavation were assumed by the county engineers on the hypothesis that material of a certain character allowing a certain slope line would be encountered when the excavation was made. Of course whenever a different kind of material was encountered, the actual slope line was necessarily either flatter or steeper, and the theoretical contents of the road prism did not represent the actual excavation. The practice of employing offsets in case of line changes adopted by the county engineers resulted as follows: Whenever an offset was employed on a curve, the theoretical contents of the excavation did not correspond with the actual excavation, the line being lengthened or shortened, and the distance between cross-sections thereby affected.

We have carefully read the evidence and examined the case from many angles, which time and space for-

bids a lengthy statement in regard to. There was no error in the trial court refusing to dismiss the suit at the close of the introduction of testimony, or in rendering the decree.

With the change in the figures above mentioned, the decree of the lower court is affirmed.

AFFIRMED. REHEARING DENIED.

MOORE, J., absent.

Denied July 15, 1919.

PETITION FOR REHEARING.

(182 Pac. 380.)

On petition for rehearing. **DENIED.**

Mr. Alfred E. Reames and Mr. George M. Roberts,
District Attorney, for the petition.

Mr. Loyal H. McCarthy, Mr. Samuel B. Huston and
Messrs. Carey & Kerr, for plaintiff and respondent.

Messrs. Chamberlain, Thomas Kraemer & Humph-
reys, for defendant and respondent.

In Banc.

BEAN, J.—Acknowledging our appreciation of the assistance rendered by the briefs of able counsel upon both sides of this suit, we note that it is earnestly urged upon a petition for rehearing that the court erred in affirming the decree of the trial court for the same amount as there decreed by reason of the fact that this court arrived at its conclusion by a different process from that followed by the trial court.

13, 14. Our former memorandum in this case indicates that plaintiff not having appealed from the decree of the lower court, we could not, if the testimony warranted, find for plaintiff in any greater sum than the decree appealed from. We do not think that the appellate court in the consideration of the case under Section 556, L. O. L., which provides for a trial *de novo* upon the transcript, and the evidence is confined to or would necessarily follow the same path of the trial court, or be governed by the same reasoning, or make the same figures in computing the amount due as made in the decree appealed from. The language of the opinions of this court heretofore rendered does not confine a review upon an appeal in an equity suit within such strict limits. In *Powers v. Powers*, 46 Or., at page 481 (80 Pac., at page 1059), former Justice BEAN uses the following language:

“Much of appellant’s brief is devoted to a discussion of the question whether the findings of fact of the trial court are supported by the evidence. Under our statute, on an appeal from a decree in a suit in equity, the cause is tried *de novo* upon the transcript and evidence accompanying it, and a final decree rendered here, without reference to the findings or conclusions of the trial court.”

In *Gentry v. Pacific Livestock Co.*, 45 Or., at page 236 (77 Pac., at page 116), the same learned justice said:

“Under our statute, on an appeal from a decree in a suit in equity, the case is tried *de novo*, and a final decree entered by the appellate court, without reference to the findings of fact or conclusions of law of the trial court.”

Whatever our view may be in regard to the evidence in the case as to the amount, we confine the same to the

amount found by the trial court. We arrive at the same conclusion as the trial court by a different route, and know of no decision in this state that restricts or hinders such a trial *de novo*.

In the short time of thirteen years that the writer has been engaged on this end of the line of work, a more solid record of material testimony, either of such volume or of any length, has never been examined. We were pleased to give it our best thought and most careful attention, employing all the time necessary. This we are aware is not indicated by the memorandum opinion.

15. Counsel for the county maintain with considerable zeal

“That if the court shall set aside the award of the highway department, and make a new award, the burden of proving the items upon which such award must be based, rested upon the plaintiff. * * That no evidence whatever of a substantive nature was ever introduced to substantiate a single item of such account,” referring to “force account.”

This important question was called to the attention of the court at the oral argument of the case, and commented upon by the respective counsel. The length of the record practically precludes a discussion of every point in the case. If we take this one which is so ably and strenuously contended for on behalf of the county, it will illustrate the others to a certain extent.

Referring, first, to some of the issues made in the pleadings relative to the force account work which are illustrative of the remainder, we find in paragraph XVII of the complaint the following:

“That at a certain other point on the line of said highway between Stations 392 and 398, heretofore known and referred to between the parties as the

'Siskiyou Curve,' the said State Highway Engineer made certain substantial changes in the location of said highway and certain substantial alterations in the plans thereof, and in making such changes and alterations failed to furnish to the plaintiff proper stakes or elevations or directions for constructing that portion of said highway, and plaintiff was compelled by direction of said State Highway Engineer to keep a large force of men on the ground at great expense waiting for directions as to the manner of doing such work, and by reason of such changes, alterations and delays, plaintiff suffered damages in the sum of \$804.

"That at Stations 674+90, 526+90, and 615+20 of said highway, the plaintiff put in place, under the grade of said highway, strictly in accordance with the plans and specifications and under the direction of said State Highway Engineer certain unprotected concrete culvert pipe. That the plans providing for the use of such pipe at said three points were defective for the reason that the pipe specified by the said State Highway Engineer for such use was not of sufficient strength to support the grade of the highway constructed thereover, and said pipe at each of said three points was crushed by the weight of the fill placed thereon. That thereupon, and after the said fill was so completed, the said State Highway Engineer directed and required the plaintiff to tunnel through the said highway fill at said three points and construct therein and thereunder at each of said three points a protected concrete culvert. That the work of constructing said three protected concrete culverts was exceedingly expensive on account of the fact that the fill at said points had been completed. That plaintiff was entitled to compensation for constructing said culverts at the prices for force account work so agreed upon between the parties, and at said prices, together with the cost of the material used in such construction, plaintiff is entitled to compensation in the sum of \$3,280."

The next paragraph XIX, is as follows:

“That at various other places along the location of said highway, not hereinbefore described, the said State Highway Engineer made numerous substantial changes in the location of said highway and numerous substantial changes in the plans thereof, and in making such changes and alterations failed to furnish to the plaintiff proper stakes or elevations or directions for constructing said highway at such points, and plaintiff was compelled by directions of said State Highway Engineer to keep a large force of men on the ground at great expense, waiting for directions as to the manner of doing such work. That at all points along the line of said highway the said State Highway Engineer caused stakes to be set indicating the elevations of the completed road bed of said highway and said elevations were computed by said Engineer with reference to a large number of bench marks which the said Engineer had caused to be established along the line of said highway, and which bench marks the said Engineer represented to the plaintiff were in agreement one with another. That the said bench marks were in a large number of cases erroneous and not in agreement one with another, and as a result the grade stakes so set for the finished road bed were erroneous and the plaintiff was therefore required and directed by the said Engineer to change the grade of large portions of said highway after they had been completed in accordance with said stakes.

“That the plaintiff was entitled to compensation for performing the work described in this paragraph at the prices so agreed upon between the parties for force account work and at said prices, plaintiff is entitled to compensation in the sum of \$15,344.25.”

In paragraph XXI, it is alleged as follows:

“ * * That in accordance with the terms of said contract plaintiff delivered to the defendant County of Jackson on or before the 15th day of each calendar month bills for all the force account work above de-

scribed performed during the preceding calendar month."

Paragraph XVII is answered in paragraph XIII of the answer as follows:

"That as to the allegations of paragraph XVII of the complaint, this defendant denies that at a certain, or any, point on the line of said highway between Stations 392 and 398, designated in the complaint as Siskiyou Curve, or elsewhere, the State Highway Engineer made certain substantial, or any, changes in the location of said highway, or certain, or any, alterations in the plans thereof or that in the making of such, or any changes or alterations, failed to furnish the plaintiff with proper stakes or elevations or directions for constructing that or any portion of said highway, or that the plaintiff was compelled by direction of said State Highway Engineer to keep a large, or any, force of men on the ground at great, or any, expense, waiting for directions as to the manner of doing the work, or for any reason, or by reason of any such changes, alterations or delays the plaintiff suffered damage in the sum of \$804, or any other sum, or otherwise, than as hereinafter alleged."

With a further answer which reads:

"Further answering the allegations of Paragraph XVII of the complaint, relating to work at the Siskiyou Curve this defendant alleges that the plaintiff did suffer some loss at said point due to changes in location and which were unavoidable, but within the terms of the contract, and for all extra work performed by him he was allowed force account therefor amounting to \$154.38, and in the final estimate hereinafter referred to he was allowed under the head of 'Extra Work Siskiyou Station' the further sum of \$950, which was allowed to, and did, include all of the claims and demands of plaintiff in said Paragraph XVII and all damages sustained by him by reason of any changes, alterations or delays at said Station and was intended to and did cover every demand on account of any of

the matters alleged in said Paragraph XVII of the complaint."

Paragraph XIX is answered as follows by Paragraph XV:

"As to the allegations of paragraph XIX of the complaint, the defendant denies that at various other places along the location of said highway, not specifically described in the complaint, or elsewhere, the said State Highway Engineer made various substantial, or any, changes in the location of said highway or numerous substantial, or any, changes in the plans thereof, except as hereinafter alleged, or that in the making of any changes or alterations, failed to furnish the plaintiff with proper stakes or elevations or directions for constructing said highway at such points, or that plaintiff was compelled by direction of State Highway Engineer to keep a large, or any, force of men on the ground at great, or any, expense waiting for directions as to the manner of doing such work or for any other reason; denies that the bench marks mentioned in said paragraph XIX of the complaint were in a large, or any, number of cases erroneous or not in agreement with one another, or that as a result the grade stakes so set for the finished road bed were erroneous, or that they were at all erroneous, and denies that the plaintiff was, therefore, or at all directed by said Engineer to change a large portion of said highway after the same had been completed in accordance with said stakes, or otherwise, except as hereinafter alleged; denies that the plaintiff was or is entitled to compensation for performing the work described in said paragraph at force account prices or at any other prices than those specified in the contract, or that at said prices, or at all, the plaintiff is entitled to compensation in the sum of \$15,344.25, or any other sum, or at all, except as hereinafter alleged."

The allegation as to delivering to the county on or before the fifteenth day of each calendar month, bills

for all of the force account work performed during the preceding calendar month as alleged in paragraph XXI is denied.

Of course, no one contends but that the burden of proof is upon the plaintiff. The important question is: Has he borne the burden?

Our notes made when reading the testimony obviate the necessity of again perusing over two thousand pages of typewritten testimony. Referring to them, thence the record, we find at page 148 et seq. of the transcript of testimony that Mr. Sweeney, the plaintiff, when a witness in his own behalf, was interrogated upon cross-examination in regard to having all his books of account at the beginning of the trial. He answered as follows:

"I expect from our records it could be worked up but it would take a long time to do it. You must remember too that I am a little short of money, I don't want to go out and hire a lot of auditors and so on to do this."

To the question:

"But when you filed the complaint and made your demand under a certain paragraph of your complaint for fifteen thousand three hundred and forty-four dollars, under paragraph 19 of your complaint,—before you could swear to this complaint, swear to your complaint making up those items you had to know it was correct?"

—he answered:

"The bills had all been furnished; we have a duplicate of those bills."

—meaning, as we understand the record, that the bills for the force account work under the contract stipulating the prices had been furnished to the county.

Frequent reference is made throughout the record to bills for "force account" work.

At page 648 et seq., of the testimony, referring to an item of force account, to the question:

"What was the amount of the work performed at force account in your opinion, or according to your best recollection?"

—he answered: "It was \$52.50."

Whereupon counsel for the county propounded the following:

"Let me ask you, Mr. Sweeney, a question right there. Mr. Sweeney, you wouldn't be able to testify to that except by looking at this tabulated statement (Plaintiff's Exhibit 90) that you have in your hand would you,—you don't know that from your independent recollection?"

To which the witness answered:

"I know about the work being done. I know where the work is, and I know about the work being done, but as to the amount, I wouldn't know, but I know there was work done there. * *

"Q. In other words, this testimony that you are giving here is just what you take off of that tabulated statement there that counsel handed you?

"A. A lot of it,—I could tell the circumstances connected with the work, and a lot of it I couldn't remember the details of it because it is quite a little while ago and there were a lot of changes being made and I couldn't possibly keep track of all of them over fourteen miles of work. But, in a general way I knew about them and I have specifically talked over those things with the time keeper and the foreman and given them my idea of what their force account work was and that sort of thing.

"Mr. Reames: But as to the amount of the labor on these different jobs, you don't know that, and you wouldn't know that unless you read it off of this exhibit that you have there, would you?

"The witness: No, sir.

"(Further questions by Mr. Kerr.)

"Q. Have you examined in the last few days, Mr. Sweeney, the copies of the force bills rendered under your direction which are on file in your office covering these items in this Plaintiff's Exhibit '90'?

"A. Yes, sir.

"Q. Do these force bills and this recapitulation of the force bills recall to your mind any recollection of any work having been done on this highway with respect to excavating below water?

"A. Well, of course, it was called to my attention and I knew it was done at the time it was done, and where it was done about,—well it was at a box culvert down on Dollarhide,—Mr. Dexter was in charge of that work,—it was the first box culvert on the line.

"Q. Well, why did you think it was force account instead of work under the contract?

"A. Well, it was under water and we always figure that work under water is something that is usually paid force account for,—as a matter of fact because it wasn't in the contract as far as I could see, and it is something special,—and the cost is a little more money than ordinary excavation."

The testimony proceeds:

"Q. What is the next item on this Plaintiff's Exhibit '90'?

"A. Well, retaining walls in under culverts, that was fixing up around the walls.

"Q. And what culverts?

"A. At this same culvert.

"Q. And why do you think that was properly chargeable to force account?

"A. Well, from the fact that they had to get some material you know, rock and stuff like that to fix up under the wall.

"Q. You remember that work being done?

"A. Yes, sir.

"Q. What was the next item on this Exhibit '90' in this segregation?

"A. Well, that is the moving cement at station 507, that is up at the Dollarhide Bridge,—that was something in the nature of a tent and cement being in the roadway and having to be moved.

"Q. Do you remember it being moved?

"A. Yes, sir.

"Q. And what is the next item?

"A. The next item is for retrimming slopes and borrow from slopes.

"Q. What do you remember about that?

"A. Well, I remember we done a lot of retrimming, quite a lot of retrimming of those places, and we borrowed from slopes. I presume that was up there on the Dollarhide Work, there was a borrow from some slopes there.

"Q. Under whose orders was that work done?

"A. Well, under the engineer's orders.

"Q. And why did you cause it to be billed as force account?

"A. Because that certainly was extra work, it was extra work for us.

"Q. Why was it extra work?

"A. Because you trim a slope down and then after you have gone, you have to come back and retrim it again,—trimming a slope is a little more expensive because it has to be trimmed to make a kind of a nice appearance, and it costs a little money to do that if you have to go and retrim it again, why you just have to spend that much more extra money.

"Q. Why did you charge borrow from slopes as force account?

"A. Well, I suppose we had to go and borrow to get material, I suppose to make the road bed.

"Q. And if you borrowed would it be necessary to retrim that slope?

"A. Well, that particular slope I don't believe it was retrimmed up very much to the best of my recollection, it may, they may have ruffed it up a little bit where they made a borrow there, but in most of the places why the slopes was retrimmed.

"Q. Supposing this had been borrowed from a place other than a slope, would it have been force account?

"A. Sir?

"Q. Suppose it had been borrowed from a place other than a slope, would it have been force account?

"A. No, sir.

"Q. Why would it be force account because it was borrowed from a slope?

"A. Well, we had already finished the work there one time and trimmed the slope and then went away and we were ordered to dig into it again."

Mr. Sweeney testified in a similar manner in relation to the different items of force account work. He certainly claimed to have a good deal of knowledge in regard to the matter. He stated that he was on the work practically all of the time, and was absent on trips to Portland to borrow money for short periods of time. His testimony in regard to the work being done is not contradicted in any way. Indeed as we understand the theory of the defendant during the trial of the cause, it was not that the force account work was not performed by plaintiff, but that he was not entitled to payment therefor at force account prices; that the liquidation should be at the regular contract or unit prices.

Mr. M. O. Bennett, one of the engineers for the county, in his testimony when a witness in behalf of that defendant, on cross-examination, explained the matter fully as follows:

"Q. Well, these plaintiff's exhibits that have been put in in connection with your testimony, covering disallowed force bills, some of them contain notations by you, and some of them do not, is that correct?

"A. Yes, sir.

"Q. And those force bills which carry notations by you were force bills which you investigated either per-

sonally or through reports made to you by your assistants?

"A. Yes, sir.

"Q. And those force bills concerning which you have testified would bear no notations but were disallowed,—what investigation of those did you make if any?

"A. Well, I would say none, I guess.

"Q. Well, why didn't you make investigation of those?

"A. In my opinion they were obviously not force account.

"Q. Because of the character of the work?

"A. Yes, sir.

"Q. You were back and forth on the ground often enough to determine that question?

"A. I think so.

"Q. Now, in these force bills which you have disallowed and upon which you have put notations, there was no question in your mind that the work was done, but the question was, that it was work which fell under the contract, that is the work covered by the disallowed part?

"A. Yes, sir.

"Q. The work was done all right, but it was work that was done under the contract?

"A. Yes, sir.

"Q. And is that true to the other disallowed bills upon which you made no notation?

"A. Yes, sir.

"Q. That is true as to all of the force bills which the plaintiff introduced as well as those particular ones to which you have testified?

"A. Yes, sir."

We find there was substantive evidence showing that the force account work was done. We cannot accede to the point so strenuously urged by counsel.

It is alleged that certain claims against the plaintiff for materials and supplies furnished in the fur-

therance of the construction of the road in question have been filed in the County Court; that some of these have been acknowledged by plaintiff; that it is conceded by the defendant bank that a portion of such indebtedness is superior to its claim. The amounts of such claims do not indicate a necessity of changing the figures of the decree in favor of the claims of the bank. The obligation of the county, if any, to pay such claims for material, etc., should not be prejudiced by a final decree. In order to protect the rights of all parties interested permission should be granted for the hearing and establishment of any such miscellaneous claims in appropriate supplemental proceedings in this suit, upon the application therefor to the Circuit Court by any of such claimants or by the county within thirty days from the date of the entry of the mandate in the lower court, and before the satisfaction of the decree herein in case such parties so desire. As to the amount and interest thereon found and adjudged to be due to the defendant bank, the payment should not be delayed on account of such claims. That in the event any such claim or claims are legally adjudged to be due from plaintiff, the same shall be deducted from the decree in favor of plaintiff in satisfaction thereof, to the extent of such established claims.

With this provision added, we adhere to our former opinion.

AFFIRMED. REHEARING DENIED.

Argued June 25, reversed and remanded July 15, 1919.

DALLAS CITY v. AETNA ACCIDENT CO.*

(182 Pac. 385.)

Municipal Corporations—Paving Contracts—Guaranty of Work—Action on Bond—Evidence—Sufficiency.

1. In an action on an undertaking executed by a paving company and an accident and liability company insuring faithful performance of a pavement contract and providing for the repair of defects attributable to defective workmanship or material within five years, the mere fact that the top or wearing surface of the pavement wore out, leaving the concrete base to disintegrate, *held* not sufficient evidence to justify a finding of defective materials and workmanship.

[As to when relation of cosuretyship exists, see note in *Ann. Cas.* 1915A, 1206.]

From Wasco: FRED W. WILSON, Judge.

Department 1.

This is an action upon an undertaking executed by the defendants Dolorway Paving Company and the Aetna Accident & Liability Company, to insure the faithful performance of a contract for paving a street in the plaintiff city. The salient clause in the undertaking is as follows:

“Now, therefore, if the said principal shall, during the period of five (5) years, repair at their own cost and expense, any and all defects in connection with the said improvement contract, which are attributable to defective workmanship or material, then this obligation shall be void, otherwise to remain in full force and effect.”

From the complaint, which was filed on February 13, 1918, it appears that the contract for the paving was let on April 30, 1913, and the undertaking executed on

*On the question as to what conditions or defects are covered by provisions in paving contract requiring contractor to keep paving contract in repair, see notes in 9 L. R. A. (N. S.) 154; 49 L. R. A. (N. S.) 922.

June 2, 1913. It is alleged that the materials used in the construction of the pavement were defective in quality and the workmanship also was defective, so that the structure had gone to pieces to such an extent as to require repairs which would cost a sum largely in excess of the liability assumed in the bond, which was \$2,000. The defendant the Aetna Accident & Liability Company was the only one that was served with summons, and the action was prosecuted against it alone. This defendant answered the complaint, denying that the pavement was in need of any repairs caused by defective materials or workmanship, and pleading affirmatively that the contractor had performed the work strictly in accordance with the terms of the contract, using good materials and proper workmanship. A reply having been filed, there was a trial by jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. Senn, Ekwall & Recken* and *Mr. J. L. Corrigan*, with oral arguments by *Mr. Corrigan* and *Mr. Frank S. Senn*.

For respondent there was a brief over the names of *Mr. William H. Wilson* and *Mr. Paul Childers*, with an oral argument by *Mr. Wilson*.

BENSON, J.—1. At the conclusion of the trial, when both parties had rested, the defendant moved the court for a directed verdict upon the ground that there was an entire absence of any evidence tending to prove that the faulty condition of the pavement was the result of either defective materials or workmanship. The

denial of this motion constitutes the only assignment of error. We have read the transcript of the testimony with care, and have not been able to discover a syllable of evidence as to the character of the materials used, or the quality of the workmanship. Indeed, the plaintiff concedes that there is no direct testimony upon the subject, but contends that the fact that the top or wearing surface wore out, leaving the concrete base to disintegrate, as it did, is ample evidence to go to the jury upon the question of defective materials and workmanship. Upon this question we are compelled to agree with the opinion of the United States Supreme Court, as expressed in the case of *District of Columbia v. Clephane*, 110 U. S. 212 (28 L. Ed. 122, 3 Sup. Ct. Rep. 568). This was an action under substantially the same sort of contract. No evidence was given that the material furnished by defendants was unsound, or that the work was not well done in putting it down. There was evidence that within three years after the completion of the work the pavement became so badly broken up and so imperfect as to require extensive repairs. In the opinion, Mr. Justice MILLER says:

“His contract was to lay the Miller Wood Pavement, a patented invention. Of the capacity of this invention for resisting weather and use, the Board of Public Works, and not he, took the responsibility. * * The language of this agreement is, that if any parts thereof, that is, the pavement, ‘shall become defective from imperfect or improper materials or construction, he will repair.’ No evidence was offered that any of the material was imperfect or improper when placed there, or that any of this construction was improperly or defectively done. We think this was necessary to enable plaintiff to recover. It will not be presumed, because the work needed repair within three years,

that the material furnished by plaintiff was originally imperfect, or that the construction was not well done."

In the case at bar, the city authorities selected a patented article, "The Dolorway Pavement," and the contract was based upon the specifications therefor. The facts bring the case clearly within the doctrine announced in the quotation above made.

It is possible that upon a retrial the plaintiff may present the necessary evidence to establish its claim. The judgment is reversed and the cause will be remanded for a new trial. **REVERSED AND REMANDED.**

McBRIDE, C. J., and BURNETT and HARRIS, JJ.,
concur.

Argued May 6, affirmed July 15, 1919.

FRANKLIN v. WEBBER.

(182 Pac. 819.)

Master and Servant—Workmen's Compensation—Statutes—Construction—"Shaft."

1. Employers' Liability Act, providing that "shafts, wells, floor openings and similar places of danger shall be inclosed" in its reference to "shafts" contemplates openings in the ground or in structures, and not revolving shafts in machinery.

Master and Servant—Workmen's Compensation—Evidence—Subsequent Repairs or Alterations.

2. In an action under the Employers' Liability Act for injuries to an employee caught in an unguarded shaft on a caterpillar engine, it was competent to show the subsequent installation of a guard over such shaft to demonstrate the practicability of guarding the shaft without impairing the efficiency of the machine.

Evidence—Workmen's Compensation—Declarations Against Interest.

3. In an action under the Employers' Liability Act for personal injuries sustained by being caught by an unguarded shaft on a caterpillar engine, evidence by plaintiff that after the injury defendant came to him and said he had fixed the machine by putting a box over it was admissible as a declaration against interest in view of Section 727, subdivision 2, L. O. L.

Release—Fraudulent Release—Return of Consideration—Necessity—Deduction from Verdict.

4. Where a release for personal injuries is obtained by fraud, a return or tender of the consideration paid is not a requisite to maintaining an action for damages by plaintiff, and upon a judgment for him it is sufficient if the amount received on the release be deducted from the verdict.

[As to accident or injury within act—Disease as accident under Workmen's Compensation Act, see note in *Ann. Cas.* 1918B, 309.]

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc.

Bruno Webber was engaged in farming about nine hundred acres of land. The seeding was done with three drills drawn by a caterpillar engine. Between the engine and drills was a cart upon which a supply of wheat was kept, so that for the purposes of description we may say that the seeding was done with a train consisting of a caterpillar engine, a cart and three drills. This train was operated by two persons, an engineer and a drill-tender. The engineer ran the engine, and the drill-tender kept the drills filled with seed.

Webber employed Howard Franklin to act as drill-tender. The plaintiff was injured on November 5, 1916, the second day of his employment. The injury occurred while Franklin was on the engine and at a time when the engine was in motion. Among the parts of the engine was an unguarded shaft. This shaft was revolving and it caught Franklin's clothing, drew his left leg into the machinery and seriously injured him.

Franklin was at once taken to a hospital. Webber held an employers' liability insurance policy. On November 28th, a couple of weeks after the accident, an agent of the insurance company which had issued the policy called at the hospital where he interviewed Franklin, and as a result of the interview Franklin

signed and delivered to the agent a written release which reads as follows:

"For the sole consideration of the sum of One hundred sixty and no/100 Dollars, this 28th day of November 1916 received from Bruno Webber I do hereby acknowledge full satisfaction and discharge of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 5th day of November 1916 while in the employment of the above.

"\$160.00."

The insurance company paid and Franklin received from it the sum of \$160. There is testimony to the effect that the company, at some time afterwards, paid doctor and hospital bills aggregating about \$600.

The plaintiff brought this action under the Employers' Liability Act: Chapter 3, Laws 1911. The complaint alleges that the duties assigned to plaintiff required him not only to attend to the drills but also to oil certain parts of the engine and that this was a work involving risk and danger; that the defendant failed to provide any guard or other safety device for the shaft, notwithstanding it was practicable to have guarded the shaft without impairing the efficiency of the machine.

The answer denies the charge of negligence, avers that the plaintiff was hurt by his own sole negligence because his employment did not require him to be on the engine, and pleads a satisfaction of the claim and release from liability.

Besides denials, the reply avers that the injury sustained by the plaintiff together with an operation performed upon his leg and drugs administered for the relief of pain and suffering had rendered him physically and mentally weak and that while in such weak

condition the insurance company through fraud and fraudulent representations obtained the writing which the defendant relies upon as a release.

A trial resulted in a verdict and judgment for the plaintiff in the sum of \$3,791.66. The defendant appealed.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Senn, Ekwall & Recken*, and *Messrs. Raley & Raley*, with an oral argument by *Mr. F. S. Senn*.

For respondent there was a brief over the names of *Mr. Walter C. Winslow, Mr. Donald W. Miles* and *Mr. R. I. Keator*, with an oral argument by *Mr. Winslow*.

HARRIS, J.—1. Calling attention to the Employers' Liability Act as diagramed in *Camenzind v. Freeland Furniture Co.*, 89 Or. 158, 168 (174 Pac. 139), the plaintiff has argued that the words "shafts * * shall be inclosed," appearing after number 23 in the diagram, make it the absolute duty of the master to inclose a revolving shaft. The complete clause, containing the quoted words, reads as follows:

"Shafts, wells, floor openings and similar places of danger shall be inclosed."

The term "shaft" has various significations; but the companion words "wells, floor openings" and especially the words "and similar places of danger" make it plain that the "shafts" referred to are openings in the ground or in structures and not revolving mechanical shafts like the one which injured the plaintiff.

The rule followed in this jurisdiction compelled the plaintiff to bear the burden of showing that it was practicable to guard the revolving shaft: *Cameron v.*

Pacific Lime & Gypsum Co., 73 Or. 510, 517 (144 Pac. 446, Ann. Cas. 1916E, 769).

The defendant interposed a motion for a nonsuit and afterwards he moved for a directed verdict; and he now contends that both motions should have been allowed because there was no evidence to show that defendant was negligent and because there was no evidence upon which the jury could have found that "it was practicable to guard the shaft without impairing the efficiency of the machine."

Franklin alleged and Webber denied that, when injured, the former was in a place where his duties required him to be. Franklin testified that Webber specifically directed him to oil certain parts of the engine and to do the oiling while the machine was in motion so that "there will be no stops and you will not lose any time." Evidence for the defendant contradicted the testimony of the plaintiff. The issue made by the pleadings was carefully submitted to the jury with appropriate instructions. The verdict of the jury necessarily implies a finding that when injured the plaintiff was on the engine in the performance of duties assigned to him; and hence the verdict forecloses further debate upon the question as to whether or not Franklin was hurt while in the performance of his work.

The defendant says that there was no evidence to show that it was practicable to guard the shaft without impairing the efficiency of the engine. However, Franklin answers by pointing to testimony of an admission made by Webber; but Webber replies by arguing that "such testimony is self-serving and it does not in any way tend to prove negligence." Franklin testified that Webber came into the hospital at some time after the former was injured and in the

course of a conversation "about how I happened to get hurt" Webber explained that there was not much danger of anybody else getting hurt and "he said he had fixed the machine; and I asked him how and he said he had put a box over it of some sort; he didn't say what kind, whether it was a wooden box, steel box, or what."

2. It was competent to show the subsequent installation of a guard for the purpose of demonstrating the practicability of guarding the shaft without impairing the efficiency of the machine; and, indeed, as stated by Mr. Justice McBRIDE in *Love v. Chambers Lumber Co.*, 64 Or. 129, 135 (129 Pac. 492),

"No better evidence could have been introduced for this purpose than to show that after the accident the machinery had been so guarded, and that such safeguards had not in any way impeded or interfered with its operation": *Foster v. University Lumber Co.*, 65 Or. 46, 64 (131 Pac. 736); *Malloy v. Marshall-Wells Hardware Co.*, 90 Or. 303, 311 (173 Pac. 267, 175 Pac. 659, 176 Pac. 589).

3. When Franklin testified to the admission ascribed to Webber the former was not repeating a self-serving declaration which he himself had previously uttered; but on the other hand he was simply telling the jury what Webber had told him; and since the declaration made by Webber was against his interest it was obviously competent, for it is expressly provided in Section 727, subdivision 2, L. O. L., that evidence may be given on the trial of "the declaration * * of a party as evidence against such party": *State v. Robinson*, 32 Or. 43, 51 (48 Pac. 357); *State v. Heidenreich*, 29 Or. 381, 383 (45 Pac. 755); *Feldman v. McGuire*, 34 Or. 309, 315 (55 Pac. 872); *Anderson v. Adams*, 43 Or. 621, 629 (74 Pac. 215); *Meagher v. Eilers Music House*,

77 Or. 70, 76 (150 Pac. 266); 1 R. C. L. 468, 473. Moreover, there was evidence explaining the location of the shaft and the relative positions of the shaft and certain other parts of the caterpillar engine. Apparently the type of engine used by Webber was in more or less common use; and it is fair to infer from the record that the engine was as well known and understood by men engaged in or familiar with farming as many other appliances commonly used on farms. The jurors were informed about the parts of the engine which were close to the shaft and they were told how a guard would have to be constructed so as to avoid interference with those parts. In brief, in addition to the testimony about the admission of the defendant, there was evidence from which the jury in the exercise of their common sense could determine whether it was practicable to guard the shaft without impairing the efficiency of the machine.

The court instructed the jury to determine the amount of compensation to which the plaintiff was entitled, if they found that the defendant was liable, and then to deduct "any sum paid by the defendant or on his behalf to plaintiff on account of the execution of the release." The defendant requested and the court refused to give the following instruction:

"It was the duty of the plaintiff before bringing this action to return to the defendant any sums of money which were paid to him or for him by reason of this injury. It is admitted that plaintiff received \$160, and I instruct you that it was his duty to return or offer to return this sum to the defendant and if you find from the evidence that he did not return this amount to the defendant nor offer to return it then he cannot recover in this case and your verdict must be for the defendant."

4. It is urged that the instruction given by the court was error and that the court should have given the instruction requested by the defendant. The plaintiff alleged that the release was procured through fraud. The defendant denied the charge. Franklin introduced testimony which if believed by the jury supported the accusation. Webber introduced testimony which if believed by the jury completely refuted the charge made by Franklin. The instructions of the court concerning the issue of fraud were complete and very clear. The verdict of the jury precludes further discussion about the issue of fraud; and hence, on this appeal we must assume that the release was obtained as described by the plaintiff. The defendant contends that the plaintiff should have alleged and proved the return of the money received upon the release or at least an offer to return the amount. The holding in *Bissett v. Portland Ry., L. & P. Co.*, 72 Or. 441 (143 Pac. 991), relieved Franklin from returning the money or even offering to return it. As said in *Marple v. Minn. & St. L. R. Co.*, 115 Minn. 262 (132 N. W. 333, Ann. Cas. 1912D, 1082, 1084),—

“it would be a profitless proceeding to send this case back for a new trial in order that defendant may have an opportunity to refuse an offer of plaintiff to return the money received. The offer is nothing. It is the actual return of the money received that is the material thing. This has been done by the verdict.”

While there is a contrariety of opinion among judicial decisions, nevertheless the larger number of cases support the rule already adopted in this state that it is unnecessary to return or tender the consideration for a release obtained by fraud as a requisite to the maintenance of an action for damages resulting from a personal injury, since it is sufficient if the amount received upon the release is deducted from the verdict

if one is obtained against the defendant: 35 L. R. A. (N. S.) 660, note.

Moreover, in *Woods v. Wikstrom*, 67 Or. 581, 602 (135 Pac. 192), this court said in substance, that it was certain from the pleadings and evidence in that case that if the plaintiff had tendered the sum received upon the release either before or after the commencement of the action the defendant would have refused to accept it for the reason that the defendant obtained the release to be used as a defense to any action brought against him and he pleaded it and relied upon it throughout the trial; and if the defendant had accepted a return of the money such acceptance would have operated as a rescission of the release and precluded the defendant from relying upon it as a defense. The statement made in *Woods v. Wikstrom* is as applicable here as it was there. Here as there the release was obtained for the express purpose of securing a satisfaction of and discharge from liability. Webber denied liability and pleaded the release in support of his denial. If the sum of \$160 had been tendered to and received by the defendant he could not have relied upon the release as a defense; and consequently we can here say, with a degree of assurance equal to that appearing in *Woods v. Wikstrom*, that an offer to return the money received upon the release would have been a vain thing "as, manifestly, the offer would have been refused." However, on the authority of *Bissett v. Portland Ry., L. & P. Co.*, 72 Or. 441 (143 Pac. 991), the instruction given by the court was correct, and the instruction requested by the defendant was properly refused: See, also, *Foster v. University Lumber Co.*, 65 Or. 46 (131 Pac. 736).

The judgment appealed from is affirmed.

AFFIRMED.

Argued at Pendleton May 5, affirmed June 4, rehearing denied July 22, 1919.

FULLER v. OREGON-WASH. R. & N. CO.*

(181 Pac. 338, 991.)

Appeal and Error—Review—Verdict.

1. Under Article VII, Section 3, of the Constitution, as amended, which declares that no fact tried by a jury shall be re-examined by any court unless the court can affirmatively say there is no evidence to support the verdict, the Supreme Court cannot consider the weight of the evidence, when there is any substantial testimony to support the verdict.

Negligence—Comparative Negligence—Injuries to Servants—Federal Employers' Liability Act.

2. Under the Federal Employers' Liability Act (U. S. Comp. Stats., §§ 8657-8665), contributory negligence goes only to the question of damages, and is not a defense.

Master and Servant—Rules—"Under Control."

3. Where rules of a railroad company required a train entering a block occupied by another train to proceed under control at a speed not exceeding six miles an hour, the words "under control" mean ability to stop within the distance the track is seen to be clear.

Evidence—Judicial Notice.

4. The courts will take judicial notice of the natural conditions of visibility early in the morning, as shown by the almanac.

Master and Servant—Injuries to Servant—Evidence—Sufficiency.

5. In action for death of a rear-end trainman, killed in a collision, evidence held sufficient to carry to jury question of negligence of railroad company.

Master and Servant—Injuries to Servant—Evidence—Sufficiency.

6. In an action for death of a rear-end trainman, killed in a collision, evidence held insufficient to show that his negligence was the sole cause of his death.

Master and Servant—Injuries to Servant—Assumption of Risk.

7. While the defense of assumption of risk is available under the Federal Employers' Liability Act (U. S. Comp. Stats., §§ 8657-8665), it does not apply to extraordinary hazards created by the negligence of a fellow-servant.

Master and Servant—Injuries to Servant—Instruction—Presumptions.

8. In an action for the death of a rear-end brakeman, killed in a collision, an instruction that the burden of proving contributory negli-

*On constitutionality, application and effect of the Federal Employers' Liability Act, generally, see comprehensive notes covering many phases of the question in 47 L. R. A. (N. S.) 38; L. R. A. 1915C, 47.

gence was on the railroad company, and that there was a presumption that he exercised reasonable care, *held* correct.

Appeal and Error—Review—Harmless Error.

9. In an action for the death of a rear-end brakeman, killed in a collision, where the pleadings admitted and the evidence showed that he was in the caboose at the time of the collision, questions as to his whereabouts a moment or two before *held* in no wise prejudicial.

Master and Servant—Injuries to Servant—Jury Question.

10. In an action under Federal Employers' Liability Act (U. S. Comp. Stats., §§ 8657-8665), for death of a rear-end brakeman, killed in a collision with a following train, an instruction submitting to the jury the question whether the company was negligent in operating the following engine backward without a headlight, required by rules of the Interstate Commerce Commission, *held* proper.

ON PETITION FOR REHEARING.

Appeal and Error—Review—Evidence—Conclusiveness.

11. Evidence in support of the verdict will be deemed conclusive on appeal.

Master and Servant—Injuries to Servant—Question for Jury.

12. In an action for the death of railroad employee killed in a collision, the question whether the tail lights on the caboose in which he was riding were burning, *held* under the evidence for the jury.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

This is an action brought under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. Stats., §§ 8657-8665), to recover damages for the death of plaintiff's intestate, Walter Francis Fuller, which was caused by a rear end collision between two of defendant's trains at North Fork, Oregon.

Deceased, at the time of the accident, and for more than five years previous thereto, had been rear brakeman and flagman on defendant's freight trains, operating in and out of La Grande, Oregon, and on the morning of the accident was acting as such on train No. 255, which left La Grande westbound at 5:45 on the evening of September 2, 1917. At Meacham station the train took on five or six carloads of sheep, the whole load

from there comprising 70 cars, including the caboose. At 2:55 A. M. on September 3d, this train pulled out from Meacham bound west. While at Meacham, train 2140 arrived there, having backed down from Kamela, a station a few miles beyond Meacham, where it had acted as a helper engine, pulling a freight train from Reith, a station next west from North Fork to Kamela, which is the station situated upon the summit of the Blue Mountains. Train 2140, was merely a locomotive engine and its tank.

Defendant claims that the track leading to the turntable at Kamela was blocked by other trains so it was necessary for 2140 to back down beyond North Fork, instead of turning, as is usual in such cases. Train 2140 had an electric headlight on the front of its engine, which would be at the east end while she was backing. At the rear end of the tank which, as the locomotive was backing, would be the front or west end of the train, there were placed the usual marker lights, one at each corner, and a white light in the center, but those lanterns would not throw sufficient light ahead to enable the conductor and engineer on the locomotive to perceive objects on the track, if the morning were otherwise dark. Except as signals to trains proceeding east, they were of no value.

Before train 255 left Meacham, McClure, the conductor, asked the conductor on 2140 to close the switch after his train, which was done. About a mile west of Meacham train 255 broke in two, and deceased went back to flag any train that might be following, and as the accident was soon remedied 255 went on without him. A few minutes later 2140 came along and was flagged by deceased, who was taken on board and carried to Huron, a station about 7 miles west of Meacham, where they overtook 255, and deceased

boarded his own train and proceeded with it to North Fork. Near Camp station, about 4 miles west of Huron, 255 broke in two again and was delayed about five minutes, when it was coupled up and proceeded to North Fork, which is about 2 miles west of Camp.

Plaintiff's evidence indicated that the tail lights and indicator on 255 were burning at Camp station, and there was a considerable down grade from there to North Fork. Train 255 had orders to side-track at North Fork for passenger train No. 4, bound east, which was due at that station at 4:07 A. M. What the running orders of 2140 were, is not disclosed, but the conductor, Guy E. Chapin, testified that at Huron deceased showed him the orders directing 255 to side-track at North Fork for No. 4; that at that time it was agreed between himself and deceased that deceased should flag 2140 into North Fork, and that 2140 should close the switch so as not to delay 255 when it left. According to the rules, 255 should have been in the clear upon the passing track at North Fork at 4:02 A. M. The evidence indicates that it arrived near the east end of the side-track about 3:56 A. M., made the usual service stop to enable the head brakeman to throw the switch for the side-track, which probably consumed not to exceed four or five minutes, and then started up, but had gone less than a car-length when it broke in two again. The effect of breaking in two is to exhaust the air and set the brakes at emergency, causing a sudden stoppage of the train, and more or less of a bumping of the cars, as the slack is taken up. It is difficult to estimate the difference in effect, as to the bumping of the cars from an emergency stop and an ordinary service stop. The conductor testified in this instance:

"It was a little out of the way for making an ordinary stop for a switch or anything. * * It would be a broken,—a break-in-to feature—where the air would be applied at once."

Mr. Hoskins, who was the only witness called in relation to the accident who was not at the time in the employ of the defendant, testified:

That the stoppage resulted in a sudden bump so that "we kind of tipped forward, and it gave a couple of bumps so the air was set quickly. It was so we knew it had broke. * * It was unusual or different from a stop. It was unusual enough so that you would know something had happened to the car, that is: it broke."

The witness testified in substance, that when the break occurred, he heard an engine coming down in the rear of the train; that the sound was so distinct that he knew it was within the block, and that the crash from the collision came immediately after. Upon cross-examination the witness said:

"It was not an almighty bump * * while a little bit more abrupt than just the stopping of a train. It was a sudden stop. We were not going very fast at the time. There was quite a jerk to it."

Witness further testified in substance that it was not over two minutes after the break occurred until the collision.

The testimony indicated that there was a bridge across the stream immediately east of North Fork station; that the bridge was 128 feet long; that the rear end of 255 was about two or three feet west of the west end of the bridge, and that the track approaches the bridge upon a curve, but that the curve was not sufficient to have prevented the rear end of 255 from being observed at a distance of 200 feet east of the bridge, if the other conditions as to light had been

favorable, or the tail lights had been burning upon the rear of the caboose. The evidence indicated that they were burning at Camp station, two miles east.

The engineer of 2140 testified that he saw no lights as he approached the bridge. There was a downgrade from the east of about 1.37 to and across the bridge. The evidence was conflicting as to the physical light conditions. The witness, Hoskins, testified that day was just breaking and that objects, such as a car or a man, could be seen two or three hundred feet away.

Chapin, the conductor of 2140, testified that it was very dark and smoky from forest fires, so he was unable to see anything ahead by natural light; that if the tail lights of 255 had been burning, he would have been able to have seen them in time to have avoided the collision. We take judicial notice of the astronomical fact that the morning twilight began at 3:44 A. M., and that the moon was about three hours high at the time of the accident.

The following rules of the company were introduced in evidence:

“When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. One-fourth of a mile from the rear of the train he will place one torpedo on the rail, continuing back one-half mile from the rear of his train, he will place two torpedoes on the rail, two rail-lengths apart. He may then return to the single torpedo where he must remain until relieved by another flagman or is recalled by the whistle of his engine. When recalled, if he does not see or hear an approaching train, the single torpedo will be removed (and not before), if conditions warrant, a red fusee will be displayed to protect his train while returning.

"During foggy or stormy weather, in the vicinity of obscure curves or descending grades, or if the other conditions require it, the flagman will increase the distance.

"Should a train be seen or heard approaching before flagman has reached the required distance, he must, at once place one torpedo on the rail, and, if by night or during foggy or stormy weather, display a red fusee, continuing in the direction of the approaching train.

"If the flagman is recalled before reaching the required distance he will, if necessary, place two torpedoes on the rail two rail-lengths apart by day, and by night display a red fusee in addition, to protect his train while returning.

"Lamps will be displayed one on each side of the rear of every train as markers to indicate the rear of the train; by day, unlighted, showing green lenses to the front and side and red lenses to the rear; by night, lighted, showing green lights to the front and side and red lights to the rear; except when train is clear of the main track, when by day green lenses and by night green lights must be displayed to the front, side and rear, and except when a train is turned out against the current of traffic, when by day green lenses and by night green lights must be displayed to the front and side, and to the rear by day green lenses and by night green light towards the inside and by day a red lens and by night a red light to the opposite side.

"By night freight trains will in addition display a light in cupola of the caboose, showing green to the front and red to the rear, except when a freight train is clear of the main track when green light must be displayed to the rear."

Other facts appear in the opinion.

At the close of plaintiff's testimony defendant moved for a nonsuit, which was denied, and at the close of all the testimony, moved for a directed verdict, which was also denied. There was a jury trial and a

verdict and judgment in favor of plaintiff for \$15,000, from which judgment defendant appeals.

AFFIRMED.

For appellants there was a brief over the names of *Mr. W. A. Robbins, Mr. A. C. Spencer* and *Messrs. Crawford & Eakin*, with an oral argument by *Mr. Robbins*.

For respondent there was a brief over the names of *Mr. George W. Peterson, Mr. George C. Styles* and *Mr. R. J. Green*, with an oral argument by *Mr. Peterson*.

McBRIDE, C. J.—1. There are several assignments of error, but the principal contention centers upon the court's refusal to grant a nonsuit, or direct a verdict, on the alleged ground that there was no evidence tending to show negligence on the part of the employees of defendant, who were in charge of train 2140. As a preliminary to the discussion, we may call attention to Section 3 of Article VII of the Constitution, which, as now amended, provides that,—

“No fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.”

We have frequently held that we are precluded by this section from considering the weight of evidence, where there is any substantial testimony to support the verdict, and in the present case we shall only consider the testimony of plaintiff, with a view of ascertaining whether there is such testimony shown in the record.

2. Again, this being an action under the Federal Employers' Liability Act it follows from the terms of the act, that if there is evidence of negligence on the part of the defendant, which contributed to the injury, we cannot consider the question of contributory negligence on the part of the plaintiff. Such contributory negligence going only to the question of damages, concerning which phase of the case no fault is found with the instructions given at the trial: *Stool v. Southern Pacific Co.*, 88 Or. 350 (172 Pac. 101).

3-5. It is a fact not disputed, when 2140 arrived at the home signal it indicated that a train was within the block a short distance ahead, and was, therefore, a warning of danger, and indicated to those in charge of that train the necessity of proceeding cautiously and under such control, which would seem necessary, in view of the circumstances, to prevent a collision with the train within the block. Under these circumstances the rules of the company made it the duty of those in charge of 2140 to stop for five minutes and proceed under control at a speed not exceeding six miles an hour. The testimony of defendant in regard to the rate of speed actually made does not assume accuracy, but is to the effect that the train proceeded at about six miles an hour, but for the purposes of this discussion it may be assumed that the actual speed was six miles an hour, and it is assumed in defendant's argument that if this was the case the train was "proceeding under control" within the meaning of the rule; but this is a mere assumption not justified by the language of the rule. The words "under control" mean, "to be able to stop within the distance the track is seen to be clear." The words "not to exceed six miles an hour" are words of limitation, and if a lower rate of speed is necessary to enable those in charge

of the train to observe whether the track is clear ahead, and to stop in time to avoid a collision, the train is not under control until its speed is reduced to that minimum. Therefore, if the circumstances—darkness or want of a headlight on the tank—rendered it impossible to see objects on the track ahead, and to stop in time to avoid them, while running at the rate of six miles an hour, it was the duty of those in charge of the train to run at such reduced speed as would seem reasonably sufficient to enable them to do so, and a failure to so control the speed would be negligence.

The question as to whether or not the tail lights on 255 were burning was for the jury. McClure, the conductor of 255, testified that they were burning at Camp, less than two miles from North Fork. It is possible, but not at all probable, that they had all gone out in the short time that elapsed between the time McClure observed them and the time of the collision. That one of these lights might be burned or jarred out, is possible, but that all three should expire simultaneously, is not within the bounds of probability. It is true the testimony of the conductor of 2140 indicates that they were not burning, but it should be remembered that he is a witness having a great interest at stake. If the lights were burning and he failed to observe them, it would indicate a negligence on his part that places the responsibility for the accident, and Fuller's death in consequence of it, upon his shoulders; and he naturally might be inclined to shield himself and color his testimony. The foregoing does not indicate the writer's view of the testimony, but it is an aspect of the case which might reasonably appeal to a trier of the facts, and a jury might reasonably weigh his testimony, in view of his connection with the accident, against the strong

probabilities against its accuracy developed by Mr. McClure's testimony, and legitimately come to the conclusion that the preponderance of the evidence indicated that the lights were burning when the accident occurred.

Conceding, however, for the purposes of the discussion, that the tail lights on 255 had been extinguished, although this seems improbable, there was still some evidence introduced by the plaintiff which tended to show that there was natural light sufficient to have enabled those in charge of 2140 to have observed the caboose of 255, and stopped in time to avoid the collision, if they had observed a cautious outlook. As shown in the statement, the witness Hoskins testified that daylight was breaking and that he was able to discern objects, such as a man or a car, at a distance of 200 or 300 feet; and this is borne out by the natural conditions shown by the almanac, and of which the court takes judicial notice without proof.

One witness, L. F. Spoar, who testified he had had fourteen years' experience as a locomotive engineer, testified that under the track conditions existing from the east end of the bridge at North Fork to 300 feet beyond, 2140 could have been stopped within about 75 feet. Now take this testimony in connection with the testimony of Hoskins, that it was light enough to have seen a car 200 feet, and we have evidence indicating, that with proper lookout, those in charge of 2140, had an opportunity to have seen the caboose of 255 and to have stopped their locomotive in time to have averted the accident, even if they were running six miles an hour.

These facts were sufficient to take the case to the jury upon the question of negligence of the defendant.

6. It is not clear from the testimony exactly what

was meant by the statement that Fuller had agreed with Chapin to flag 2140 into North Fork. It is evident there was no understanding that he would flag them in until his own train "was in the clear." He had not agreed to flag them against his own train but against No. 4. That is to say, that when 255 had got upon the passing track with room left for 2140, Fuller would flag against No. 4 so that 2140 could safely follow in upon the passing track. This seems the probable meaning of the agreement, as we understand the testimony.

Now as to Fuller's duty to flag under Rule 99, the rule, as quoted in the statement, does not absolutely require a flagman to go back with stop signals every time the train stops, and everyone who is accustomed to railway travel, knows it is not done. It is only "when a train stops or is delayed under circumstances in which it may be overtaken by another train" that the flagman is required to go back and flag. This leaves something to the judgment of the flagman and the conductor as to the conditions which may or may not involve a liability to be overtaken by another train.

On cross-examination McClure testified as follows:

"Q. Now, Mr. McClure, going into a station like North Fork, where you know you are going to head in on the passing track, it is the duty of the flagman to be there ready to go out flagging immediately?"

"A. Well, under ordinary circumstances we stop and head right in. I wouldn't expect it, no, sir.

"Q. Do you know where the S. board is there at North Fork, or was at that time?"

"A. I know about where it was, yes.

"Q. Where was it with reference to the hind end of this train, when you stopped your seventy cars to head in?"

"A. Well, the caboose was outside the S. board at that particular place.

"Q. Do you mean to tell this jury when you stopped to head in, and your hind end is outside the S. board, you don't have your flagman go out?

"A. Well, it is not customary. That is, where you stop and head right into a place. Of course if you are delayed any length of time they are supposed to go right back.

"Q. What do you call being delayed any length of time?

"A. Well, I should think a delay of three or four or five minutes.

"Q. Would you let the hind end of your train stick out there three or four or five minutes before you would send your flagman out?

"A. Well, that would depend.

"Q. Well, what would it depend on?

"A. Well, it would depend on conditions—of the track and grade and such as that.

"Q. Well, I am asking you with reference to conditions as they existed there at that time and place, and this grade and this track?

A. Well, it was his duty to go out and flag there at that place.

"Q. And it was his duty to go out immediately?

"A. Yes.

"Q. And he should have been in a position to go out and flag immediately, under those circumstances, should he not?

"A. Yes.

"Q. And he understood that is where he should have been?

"A. Yes."

We think the above testimony clearly indicates that it was not customary for the flagman to go back at an ordinary stop made for the purpose of heading in on a switch, but that if anything unusual occurred, such as the breaking of the train, or there was reason to expect some danger from the rear, it was his duty to go immediately. The breaking in two of the train was such

a contingency but, according to Hoskin's testimony, the collision happened almost at the same moment. Whether Fuller was in the act of starting or preparing to start with his lantern and fusees, is not disclosed. His body was in an erect position when it was found, so he was probably on his feet, and as he had been prompt to go out and flag on other occasions on the same run when the train separated, it would be unfair to assume that he was not equally diligent on this occasion. Irrespective of any presumption that he was doing his duty, there is small ground for the assumption that he was neglecting it.

Most of the testimony introduced by plaintiff on this phase of the case was necessarily drawn from persons who were, at the time of the accident, in the employ of the defendant, and some of whom a verdict in favor of plaintiff would impliedly convict of negligence. Under the circumstances, it is safe to say that they were, to a certain extent, unwilling witnesses, and that nothing was volunteered that was prejudicial to defendant; but with all these drawbacks we think the plaintiff presented a case sufficient to go to the jury, and that defendant fell short of making one showing the negligence of the deceased was the sole cause of his death, if indeed it has shown that he was negligent in any particular.

7. While the defense of assumption of risk is permissible in actions brought under the Federal Employers' Liability Act, it is settled that it does not apply to extraordinary hazards created by negligence of a fellow-servant: *Stool v. Southern Pacific Co.*, 88 Or. 350 (172 Pac. 101). The order permitting plaintiff to amend the reply was within the sound discretion of the court, and we are not prepared to say that such discretion was abused in the present instance.

8. The defendant urges there was error in the following instruction:

“Now, you are instructed that the burden of proving that Fuller was guilty of contributory negligence, is upon the defendant, and in this connection you are instructed that in a death case, such as this is, there is a presumption that the deceased exercised reasonable care for his own safety, and the deceased is entitled to the benefit of this presumption, unless you find under all of the facts and circumstances of the case, by a fair preponderance of the evidence, that Fuller was negligent and such negligence contributed to cause his injuries and death.”

We think the instruction was proper under the circumstances. The contention of defendant was, that the negligence of the deceased was the sole cause of the accident. The case was in this position: (1) It was incumbent upon the plaintiff in the first instance to show the negligence of the defendant's servants in charge of 2140, and there was in their favor a presumption to begin with, that they performed their duty and exercised reasonable care for their own safety and for the safety of other trains on the road. When it attempted to impute negligence, either contributory or sole, to deceased, plaintiff was entitled to invoke the same presumption in favor of his conduct. This is the doctrine sanctioned in this state in *McBride v. Northern Pacific R. R.*, 19 Or. 64 (23 Pac. 814, 42 Am. & Eng. Ry. Cas. 146). The presumption is not invoked primarily for the purpose of showing that the defendant was negligent, but for the purpose of placing upon the defendant the burden of proving the negligence of deceased. The instruction stated the law so far as it went and there was no request for an instruction to like effect on behalf of the defendant.

In view of the fact that the court in its charge reiterated several times the statement that the burden of proof was upon the plaintiff, to establish by the preponderance of evidence the negligence of defendant, so this must have been thoroughly impressed upon the mind of every jurymen. We do not think it was possible for the jury to have formed any impression, prejudicial to defendant, from the failure of the court to say in direct language that defendant's servants were presumed to have done their duty, and not to have been negligent. The charge seems to be eminently fair and clear.

9. It is urged as error that the court permitted evidence tending to show that Fuller might have been somewhere else on the train than in the caboose, when the collision occurred, and that as the complaint alleged he was in the caboose and attending to his duties, the introduction of such evidence was prejudicial. To this objection it may be answered that there was no testimony admitted tending to show that deceased was anywhere else than in the caboose at the moment of the accident. The complaint alleged this; the answer admitted it; all the evidence showed it and nobody disputed it. Where he was a minute before the collision, or during the stop, was not pleaded. In detailing the circumstances immediately preceding the collision, it would not have been far-fetched or improper for plaintiff to have shown the general duties of deceased in connection with the train, or that he had such duties as might have required his immediate attention before he entered the caboose. The questions asked elicited nothing prejudicial to defendant, and did not tend to contradict any fact alleged in the complaint.

10. Another assignment of error is in regard to the instruction of the court, leaving to the jury the ques-

tion of negligence by reason of the failure of the defendant to have upon the westerly end of the tank an electric headlight. This objection is urged with much force and plausibility, and to discuss it properly, it is necessary to consider the state of the pleadings and proof upon this branch of the complaint.

Subdivision 10 of the complaint is as follows:

“That during all the time hereinbefore mentioned and alleged and on the day and at the time of the happening of said accident and injury to said Fuller hereinbefore alleged, it was the duty of the defendant to equip, maintain and use its said certain locomotive engine then and there being operated and handled over the defendant’s said main line track towards and in the direction of the said caboose wherein said Fuller was stationed and situated at said time at the forward or westerly end thereof, with an electric headlight, of sufficient candle-power, measured with a reflector, to throw a light in clear weather, that would enable the engineer, who was then and there operating, handling and controlling said locomotive engine, to plainly discern an object the size of a man, or larger, and more particularly the caboose on which said Fuller was then and there stationed and situated, as hereinbefore alleged, at a distance of not less than 800 feet therefrom, and to maintain and use such headlight upon said Westerly and forward end of said locomotive engine at the time and place where the said accident and injury to said Fuller occurred, to the end that said locomotive engineer might see and observe obstacles or obstructions upon the track, such as other engines, cars or trains, in ample time to stop and thereby avoid same.”

Having thus stated the duty of the defendant, subdivision 11 proceeds to set forth the breach of such duty as follows:

“On the morning of September 3, 1917, defendant negligently and unlawfully propelled and operated

along its main line track in a westerly direction, the said locomotive engine hereinbefore mentioned and described, which said locomotive engine was not then and there equipped with an electric headlight at the forward and westerly end thereof, of the candle-power required by law, as hereinbefore alleged, and the defendant negligently, wrongfully and unlawfully failed to equip, maintain and use at the forward and westerly end of said locomotive engine, then and there being operated backward along over its said main line track, any headlight at all, so as to enable the engineer operating and handling said locomotive engine, to see and discern upon the said track, any obstacle or obstruction thereon in time to avoid accident or collision therewith."

The charge of the court, in relation to the matter thus pleaded, was as follows:

"It is likewise charged in the complaint that the defendant negligently operated extra 2140 without having a standard headlight on the front end thereof, having in mind the direction in which extra 2140 was running, or in other words, that there was no standard headlight on the rear end of the tender. This charge of negligence is practically the equivalent of the charge that the defendant negligently operated extra 2140 backwards. The court submits to you the issue in this connection, whether, if the defendant chose to operate extra 2140 backwards, it failed to exercise ordinary care by reason of not having the rear end of the tender equipped with a standard high-power headlight. If you find that the defendant was negligent in the particulars in question, and you further find that such failure so to equip with a standard high-power headlight proximately resulted in the collision of extra 2140 with the rear end of No. 255, and resulted in the fatal injuries to Walter Francis Fuller, it is your duty to find for the plaintiff."

The language of the complaint, alleging the duty of the defendant with reference to lights upon the loco-

motive, is substantially identical with the requirements of Rule 29, promulgated by the Interstate Commerce Commission on December 26, 1916, although no reference is made in the complaint to such rule, which reads in substance as follows:

"Each locomotive used in road service between sunset and sunrise shall have a headlight, which shall afford sufficient illumination to enable a person in the cab of such locomotive * * to see in a clear atmosphere a dark object as large as a man of average size, standing erect, at a distance of at least 800 feet ahead of such headlight. Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear a headlight, which shall meet the foregoing requirements. * *

"It is further ordered that said rules shall apply to all locomotives constructed after July 1, 1917, and for locomotives constructed prior to that date, the changes required by the above rules shall be made the first time locomotives are shopped for general or heavy repairs after July 1, 1917, and all locomotives shall be so equipped before July 1, 1920."

It does not appear either from the complaint or the testimony that the locomotive in question was regularly required to run backward, or that it was constructed after July 1, 1917, or that it had been shopped for general or heavy repairs, after the promulgation of the above order, therefore, if there was any liability for the failure of defendant to have such a headlight, as described in the complaint, upon the rear end of 2140 on the night of the accident, it would have to be found under the general clause of the Employers' Liability Act and not under the rules of the Interstate Commerce Commission. The Federal Employers' Liability Act does not undertake to define negligence,

but leaves the term to stand as defined at common law, so that the question as to whether it was common-law negligence to run train 2140 backwards, on that trip, on that grade and under the atmospheric and natural conditions then existing, and with the knowledge that there was a train close ahead and a final warning of danger at the home signal, without such light as that alleged in the complaint to have been necessary, was, we think, one which the court had a right to submit to the jury.

We do not understand that the orders of the Interstate Commerce Commission fix, or are intended to fix, the maximum of negligence in the use of lights, or in the operation of trains. The trip to be made was from the summit of a high range of mountains down a steep grade and in the night-time. Whether the circumstances justified defendant's agents in making it without waiting for daylight, or until they could get to the turntable and turn around, so as to proceed with their light in front, was a question for the jury. Whether making the trip under the circumstances without such a light on the rear, as the wisdom and experience of the Interstate Commerce Commission had found sufficient for the safe operation of a train proceeding regularly, was also a question for the jury. For the defendant's employees to go banging down that grade in the dark at the rate of six miles an hour, with the home signal indicating danger, and with the knowledge that there was another train less than a mile away standing upon the same track, would appear to the average layman to have been an almost reckless proceeding, and yet this is the situation shown by the testimony of defendant's employees upon train 2140.

If circumstances ever existed where the best of light or the greatest caution should have been used, they

are shown by the testimony of defendant's conductor to have been present here. He is not shown to have been running under orders; neither is it shown that it was necessary that he should have made the trip in the night-time, and it was proper for the judge to submit to the jury the propriety of his running an unequipped, unlighted train under the conditions.

The language used by the court in the instruction in describing the headlight, might be subject to some criticism from an expert railroad man's standpoint, but we think it in no way misled the jury.

Other minor objections are urged and have been carefully considered, but we deem them without merit. The real and vital questions upon the trial, and those chiefly argued here, were (1) the alleged sole negligence of deceased, and (2) the instruction of the court in regard to the train backing down without a headlight. These have been the subjects of long and serious consideration, with the result above indicated.

The judgment is affirmed.

AFFIRMED.

Denied July 22, 1919.

ON PETITION FOR REHEARING.

(181 Pac. 991.)

Petition for rehearing denied.

Mr. W. A. Robbins, Mr. A. C. Spencer and Messrs. Crawford & Eakin, for the petition.

Mr. George W. Peterson, Mr. George C. Styles and Mr. R. J. Green, contra.

In Banc.

McBRIDE, C. J.—In a vigorous petition for rehearing, the soundness of the opinion heretofore rendered is challenged in several particulars.

It is first called to our attention that in several instances the opinion refers to Guy E. Chapin, the engineer in charge of train 2140, as the "conductor" instead of the "engineer," and this criticism is technically correct. Train 2140 consisted of a locomotive with tank attached and had no technical conductor, but was in charge of the engineer; but we submit that being in charge of the locomotive, his position approached quite as nearly that of a conductor, as the locomotive and tank approximated to a train, which is what defendant's witnesses called it. We apologize, and hereafter Mr. Chapin will be known and designated in the Oregon Reports as "Engineer of Train 2140."

Our attention is also called to the fact that we have inadvertently called the intermediate signal, half a mile east of the North Fork bridge, the "home signal" and this criticism is also correct; but we call attention to the fact that it showed just as red and indicated danger just as effectually as though it had been designated by its proper title, and Engineer Chapin says that it was "red and showed danger." The opinion nowhere indicates that train 2140 ran past the intermediate signal without stopping. It did stop for five minutes and then, with the danger indication still showing, went ahead at the rate of at least six miles an hour with the knowledge on the part of those operating it that 255 was on the main track half a mile ahead.

11, 12. We are also criticised for saying, in effect, that if the tail light of 255 had been burning, the engineer of 2140—called in the opinion, the "conductor"

—could have discovered that fact at a distance of 200 feet east of the bridge, if other conditions had been favorable. Such is the testimony of Hoskins, which, for the purpose of an appeal, is conclusive, but stronger than this is the testimony of Engineer Chapin, who testified as follows upon cross-examination:

“Q. If those tail lights had been burning in the caboose, which you say they were not, you would not have had any difficulty in seeing the end of the caboose and stopping 2140?”

“A. No, sir.”

This left for the jury the question as to whether the tail lights were burning, and—as shown in the original opinion—they had a right to weigh the statement of a witness having a strong moral interest in the result, against the intrinsic improbability that all three of the tail, or marker lights, which are independent of each other, should have been extinguished, when it had been shown that all three had been burning a little over two miles back; and especially when Engineer Chapin’s testimony, as to natural light conditions, had been contradicted by Hoskins, an entirely disinterested witness.

It is earnestly urged that the testimony shows that 2140 was running “under control” at the time of the accident. It is true that several very estimable gentlemen connected with the railroad, testified that in their opinions such was the case, but, viewed from the standpoint of the rules, their judgment is not sustained. The words “under control” are defined in the defendant’s book of rules, as follows: “Under Control: To be able to stop within the distance track is seen to be clear.” This does not mean to run six miles an hour, which is the maximum speed at which a train may be said to be under control under any cir-

cumstances, but means such a rate of speed as, under the particular conditions, will enable those in charge of a train to stop in time to avoid accident. If the circumstances are such that objects upon the track may be discovered, a considerable distance ahead, six miles an hour may be a sufficiently low rate of speed, but if there is a considerable downgrade, combined with dark or foggy weather, and no light in front of the train, a speed of one mile an hour may be required in order to conform to the rule. Taking defendant's testimony alone, there was every condition demanding the most extreme caution. The route was over a heavy downgrade from the summit of a high range of mountains; the locomotive left Kamela in the night, backing down this grade without any light upon the tank, which then constituted the front of the train; what little natural light, that ordinarily would have existed, was diminished by smoke; the intermediate signal east of North Fork showed a train on the main track, about half a mile ahead. Under all these circumstances it was for a jury to say whether defendant's engineer acted prudently in maintaining a speed of six miles an hour and, considering the force and physical consequences of the impact, whether he in fact was running at so low a rate of speed as that claimed by him. They were the exclusive judges of the value of his testimony as to the conditions and speed of the train, and we think there was sufficient testimony to justify a finding that he was negligent.

It is true that there is evidence on behalf of defendant, tending to explain these circumstances, but the people of this state, in their collective wisdom—or unwisdom—have seen fit to ordain that in law actions, the comparative weight of testimony shall not be examined upon appeal, and, therefore, we are precluded

from a full discussion of that subject, having no right to substitute our own judgment for that of the jury.

Our statement, that it was fairly deducible from the evidence, that Fuller had agreed to flag 2140 against No. 4 passenger, is criticised as not borne out by the testimony. Let the testimony speak for itself. On page 218 of the evidence we find the following testimony of Engineer Chapin upon cross-examination:

“Q. And, if necessary, Fuller would flag you against No. 4?”

“A. Yes.

“Q. Of course No. 4 was a passenger train?”

“Mr. Crawford: I think you are misquoting the witness in saying he was to flag as against No. 4.

“Q. Then Fuller was to flag you and protect you as against No. 4.

“A. Yes.”

Whether sufficient time elapsed between the breaking in two of train 255 and the collision to have enabled Fuller to get his lantern and fusees and start back east to signal 2140, were questions of fact for the jury. As remarked in the original opinion, it may well be that he was in the act of starting when the collision occurred. The only voice that could have explained his movements is stilled by death, and we are not prepared to say that he, who is shown to have been careful and diligent upon other occasions during the trip, was neglecting his duty and recklessly exposing his own life in this instance.

Our attention is called to the fact that the train order for 2140 is in the transcript. This criticism is correct, although the fact itself is not material. The order reads: “September 3, 1917. Engine 2140, run extra Kamela to Pilot Rock Junction; take siding, meet extra 2162 east at Duncan.” No time of starting

is given. How long 2140 would have been delayed at Kamela, in order to have turned around and proceeded west with the locomotive in front, does not appear. There is a long double track at Kamela and the train sheets indicate that the only train there when 2140 left, was the one 2140 had helped to pull up the grade to that point. This train was due to proceed on its eastward course and it would seem, under the conditions, reasonable prudence would have dictated that 2140 should have delayed its departure a few minutes and turned around, so its engineer might have the benefit of the powerful lights on the locomotive on the westward trip. At all events, the order does not indicate that 2140 was required to run backward.

While it is not negligence *per se* to run a train backward, and while it is not unusual for trains to be so run, especially in daylight and for comparatively short distances, conditions may exist when so operating a train, and especially in the dark and down steep grades and without lights sufficient to indicate possible obstruction on the track, may constitute negligence, and this is as far as the original opinion goes or was intended to go.

The court's instruction as to the headlight was, we think, sufficiently discussed in the original opinion. We think it fair to assume that the headlight, required by the Interstate Commerce Commission, which is shown to be one of high power, supposed to disclose objects one thousand feet ahead of the train, is the standard headlight, made so by the order and by general acquiescence and used all over the country, and this, evidently, was what was in the court's mind when the instruction complained of was given. The complaint charged, in substance, that neglect to have such a light on the west end of the train was one of

the causes contributing to the accident. We are of the opinion that there is evidence tending to show that if such a light had been maintained, the engineer of 2140 would have seen the caboose of 255 in time to have stopped his train; so that in any event it was not error for the court to instruct as it did in regard to that branch of the case.

The objection urged seems more to the court submitting to the jury the question of the propriety of running without the light particularly described in the instruction, rather than the necessity of having *some* kind of light. Had there been any light whatever on the tank, and a dispute as to its sufficiency, an instruction of the character indicated might possibly have been prejudicial; but it is conceded that there was no light of *any* kind on the tank except the markers, which it is also conceded were not useful in enabling the persons operating the train to discern obstructions on the track, so the instruction in substance left the jury to determine whether it was negligence for defendant's servants to operate the train without lights under the conditions disclosed by the testimony.

The jury were fully instructed in accordance with the contention of defendant as to Fuller's duty to go back and flag trains when his own train was delayed upon the track; whether he had time to do this after he became aware that his train was more than momentarily delayed, for the purpose of heading in, was left to the jury. Whether there was time for him to have gotten his lantern and fuses and got out of the caboose, was a question of fact for the jury. While, in view of the testimony and the instruction of the court, the statement in the original opinion that "The rule does not absolutely require the flagman to go back with stop signals every time the train stops,"

etc., may be in the nature of *dictum*, the writer, speaking for himself, is firmly of the opinion that the rule bears the construction indicated.

Taken as a whole, we are of the opinion that the trial and instructions were eminently fair to the defendant, and that no substantial error was committed to its prejudice; and that while this court sitting as a jury of seven to try the facts, might come to a different conclusion from that arrived at by the jury that tried the cause, there is sufficient evidence to support their finding.

We adhere to the conclusion reached in the original opinion.

AFFIRMED. REHEARING DENIED.

Argued July 1, affirmed July 22, 1919.

FRAYN v. PENNINGTON.

(182 Pac. 556.)

Sales—Fraudulent Representations of Seller's Agent—Instruction.

1. In suit for breach of contract by which plaintiff was to deliver to defendants a certain number of copies of its store paper service, defense being that defendants were induced to execute contract upon fraudulent representations of plaintiff's agent as to plaintiff having contracts with other firms, *held*, that question of fraud was fully and fairly submitted.

Principal and Agent—Acts of Agent Within Apparent Scope of Authority—Instruction.

2. In suit for breach of contract by which plaintiff was to deliver to defendants a certain number of copies of its store paper service, defense being that defendants were induced to execute contract upon fraudulent representations of plaintiff's agent as to plaintiff having contracts with other firms, *held*, that question of authority of agent was fairly and fully submitted.

[Representation must be false when made, see note in 18 Am. St. Rep. 555.]

From Lane: **GEORGE F. SKIPWORTH**, Judge.

Department 2.

Plaintiff alleges that he was doing business in the City of Seattle under the firm name of Retailers Advertising Association; that prior to the commencement of the action he had complied with Chapter 154, Laws of Oregon, 1913; that on or about May 6, 1916, the plaintiff entered into a written contract with the defendants, as partners under the firm name of Linn Drug Company, by which plaintiff was to deliver to defendants 48,000 copies of its store paper service in 24 editions of 2,000 copies each, commencing on May 25, 1916, and every 15 days thereafter, to be known and printed as the "Eugene Booster," at the agreed price of \$20 per issue upon certain terms and conditions therein stated, for which it was agreed that the defendants should pay \$480 in monthly payments of \$40 each.

The plaintiff alleges that he had performed and is ready and willing to perform his part of the contract; that defendants have failed and refused to perform their part of the contract, or to accept the 2,000 copies of the paper sent to them on July 5, 1916, and have notified plaintiff that no more copies will be accepted; that it cost plaintiff \$28.95 for labor and material to print and publish the copies which had been printed upon which he would have made a profit of \$51.93 and \$270 profit on the remaining copies, and by reason of the defendants' breach of the contract asks for a judgment of \$350.

The defendants admit the partnership and deny all other material allegations and for a first, further and separate answer allege certain facts as a plea in abatement. As a second affirmative defense defendants allege that they were induced to execute the contract by

reason of certain alleged statements and representations which were made by plaintiff through its agent, which were false and untrue and which the plaintiff knew to be false and untrue and upon which the defendants relied and believed to be true and set forth alleged facts tending to show that the contract was procured by means of fraud. A copy of the written contract was attached to and made a part of the complaint.

In a further and separate answer, for the purpose of obtaining equitable relief, the defendants again alleged the making of the fraudulent statements and representations.

The trial court sustained the plaintiff's demurrer to the plea in abatement and the further and separate answer for equitable relief. In his reply the plaintiff denied all the material matter of the second further and separate answer and alleged certain new matter to which the court sustained the defendant's motion to strike.

After both parties rested, plaintiff made a motion for a directed verdict, which was overruled. The jury returned a verdict for the defendants, upon which judgment was entered and plaintiff appeals, claiming that the court committed error in overruling plaintiff's demurrer, to the answer, in sustaining defendants' motion to strike out a portion of the reply, in refusing to give certain instructions requested by the plaintiff and in particular the charge that the jury "might find from the evidence that J. M. Schreiber had apparent authority to make false representations to the defendants," and in overruling plaintiff's motion for a directed verdict.

AFFIRMED.

For appellant there was a brief over the names of *Mr. L. M. Travis* and *Mr. A. K. Meck*, with an oral argument by *Mr. Travis*.

For respondents there was a brief and an oral argument by *Mr. O. H. Foster*.

JOHNS, J.—It appears from the record that the defendants were induced to execute the contract upon fraudulent statements and representations of Schreiber as plaintiff's agent, who represented to the defendants that the plaintiff had advertising contracts with prominent eastern and Portland firms, and the plaintiff admits that he never had any contract with such firms.

Plaintiff alleges that he was to receive \$80.88 for the first four publications, from which he would have made a profit of \$51.93 and that he would receive \$400 for the remainder of the contract, out of which he would have made a profit of \$270 or a profit of \$231.93 on a contract of \$480.88 for which, including labor and material, he asks judgment for \$350.00.

Among others, the court gave the following instruction:

"I instruct you that these are the elements of fraud which the defendants must show before you would be entitled to find a verdict for the defendants. First, that the plaintiff through Schreiber made the representations claimed by the defendants. Second, that the representations, if they were made, were false. Third, that when the representations were made, if they were made, Schreiber knew them to be false or made them recklessly without any knowledge of their truth and as a positive assertion. Fourth, that he made the representations, if any were made, with the intention that they should be acted upon by the defendant Pennington. Fifth, that the defendants acted

in reliance upon such representations, if they were made, and the defendants were thereby injured.

"Each of these elements must be proved with reasonable certainty and all of them must be found to exist. The absence of any one of these elements is fatal to the defense in this case.

"I have instructed you if you find from the evidence in this case that the agent Schreiber was not acting within the actual scope of his authority but was acting within the apparent scope of his authority and made the representations claimed, and if they were false under the rules which I have just given you, then the defendants would be entitled to a verdict."

1, 2. The questions of fraud and of the authority of the agent Schreiber were fully and fairly submitted to the jury, which found for the defendants.

The judgment is affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued July 8, reversed and dismissed July 22, 1919.

FURUSET *v.* MAYS.

(182 Pac. 558.)

Trusts—Active Trust—Title of Beneficiaries.

1. Where plaintiff holder of legal title conveyed lands to defendant as trustee to sell and dispose of the same for the mutual benefit of plaintiff, defendant, and H., and defendant had the land surveyed and platted, sold portions, applying proceeds as agreed, and at the request of his associates conveyed to each of them certain portions, which were unsalable, leaving the property involved still undisposed of, *held*, that trust as to lots involved continued until prospective purchasers should make their final payments, so that plaintiff and his assignees had no interest in the land, but simply in the proceeds.

Trusts—Suit to Compel Conveyance by Trustee—Parties.

2. Where plaintiff holder of legal title conveyed lands to defendant as trustee to sell and dispose of the same for the mutual benefit of plaintiff, defendant, and H., and plaintiff undertook to convey to B. an undivided one-third interest, B. and H. would be necessary par-

ties to suit to compel defendant to convey the undivided one third to B.; the trust still existing.

[As to duty to ascertain powers of trustee, see note in 19 Am. St. Rep. 270.]

From Multnomah: WILLIAM GALLOWAY, Judge.

Department 1.

This is a suit to compel a conveyance of an undivided one third of certain lots in what is known as "Rosemont Addition to East Portland." In 1891, plaintiff being the holder of the legal title to certain lands, conveyed the same to defendant as trustee, to sell and dispose of the same for the mutual benefit of plaintiff, defendant and one A. S. Haskell. The obligation assumed by the trustee was to sell and dispose of the property, pay all liens and encumbrances thereon, all taxes and assessments, and all expenses incident to holding and disposing of the property, and divide the net proceeds thereof equally between the three. The trustee then had the land surveyed, platted and dedicated as "Rosemont Addition to East Portland" and sold a portion of the premises by lots and blocks, applying the proceeds as agreed, and then, at the request of his associates, conveyed to each of them certain portions of the remainder, leaving the property involved herein, still undisposed of. On March 5, 1913, plaintiff undertook to convey, by deed, an undivided one-third interest in such unsold lots to one John Rometsch. Thereafter Rometsch demanded a deed thereto, from the defendant trustee, who still holds the legal title, which being refused, plaintiff filed his complaint herein, on March 19, 1914. The complaint states the terms and conditions of the trust substantially as above set out, but with the additional averment,—

"That any portion of said property which should remain unsold, said F. P. Mays would hold the title to such portions of said real property remaining in trust for the said George Sorenson or his assignees to the extent of one third in favor of the said George Sorenson or his assignees or transferees."

It is then averred:

"That the said trusteeship of the said F. P. Mays has been fully consummated and terminated and the said F. P. Mays has no interest of law or equity in the title of said real estate, and all claims, liens and demands against the interest of said George Sorenson have been liquidated and discharged."

The prayer is for a decree requiring the defendant to execute a good and sufficient conveyance of an undivided one third of the property described, free from encumbrance, to John Rometsch.

A demurrer to the complaint was filed, upon the grounds that Rometsch and Haskell are necessary parties, and also that the complaint does not state facts sufficient to constitute a cause of suit. The demurrer was overruled and defendant answered, with some denials and admissions, pleading affirmatively, among other things, as follows:

"Denies each and all of the allegations contained in paragraph IX of plaintiff's complaint. And in this connection defendant alleges the truth to be, that at the time said premises were conveyed to this defendant by plaintiff, it was agreed between the plaintiff, this defendant and said A. S. Haskell, that this defendant should take and hold the title to said premises upon the trust for said three persons, and that he should sell and dispose of the same, pay and satisfy all liens and encumbrances against said property and the taxes and assessments, and all expenses incident to the holding and disposal of said property, and divide the net proceeds thereof equally between said three persons; that

thereafter by and with the consent of all said three beneficiaries, the defendant dedicated as 'Rosemont Addition to East Portland,' in the City of Portland, and thereafter this defendant sold a portion of said premises by lots and blocks, to wit, twelve lots, and applied the proceeds thereof upon said mortgage indebtedness and the expenses of surveying and platting said premises, and at the request and with the consent of all said three beneficiaries, defendant deeded to each of them certain lots in said Rosemont Addition, and now holds, undisposed of, the following lots in said addition, to wit: Lots 1, 2, 3, 7, 11, 12, 15 and 16, in Block 5, and Lot 1, in Block 3, and no more; that at the time certain of said lots were conveyed to said beneficiaries as hereinbefore set forth, said property was clear of all encumbrances, and all taxes and other assessments were paid; (that subsequent thereto, this defendant has advanced all taxes and assessments assessed against said nine lots, aggregating about \$360, of which amount about \$120 is chargeable against the interest of said plaintiff in said nine lots; that there is now a proposed sewer assessment against said nine lots of \$69.75 which has not been paid, of which one third will be chargeable against the interest of the plaintiff.)"

Plaintiff's reply to the foregoing paragraph of the answer is as follows:

"Plaintiff admits the allegations of new matter set out in paragraph nine of said answer down to line 23 of page 7 thereof, and plaintiff denies generally and specifically each and every allegation contained therein from said line 23 to and including line 30 of said page 7 of said answer."

The parentheses in the portion of the answer quoted indicates the part which is denied.

A trial being had, there was a decree for plaintiff in accord with the prayer of the complaint, and defendant appeals.

REVERSED AND DISMISSED.

For appellant there was a brief over the name of *Messrs. Huntington & Wilson*, with an oral argument by *Mr. Bela S. Huntington*.

For respondent there was a brief submitted without argument by *Mr. Wilson T. Hume*.

BENSON, J.—1, 2. The entire case for the plaintiff is based upon the theory that the purposes of the trust were entirely concluded when the unsold lots were, by conveyance from the trustee, divided among the associates, and that by reason thereof, neither Rometsch nor Haskell is a necessary party to this litigation. This attitude is contrary to the express admissions of the reply as quoted in our statement of the case, and is not supported by the evidence. The testimony establishes very clearly that the lots which by mutual consent were divided among the three beneficiaries of the trust were unsalable, and therefore withdrawn from the effect of the previous agreement. As to the lots now in controversy, it was intended that the trust should continue until the prospective purchasers should make their final payments thereon, and the defendant issue the necessary conveyances therefor. Such payments have not been made and the intending purchasers have abandoned their contracts, so that the trust, as to these lots, is as vitally active as upon its inception. It does not require the citation of authorities to sustain the conclusion that Haskell was a necessary party to the suit, and the same may be said as to Rometsch, who was the real party in interest, rather than the plaintiff.

But even if they had been brought in, the result must have been the same, since the conditions of the trust are such that the plaintiff and his assignee have

no interest in the land, but simply in the net proceeds arising from its sale: *Kollock v. Bennett*, 53 Or. 395 (100 Pac. 940, 133 Am. St. Rep. 840).

The decree is reversed, and one will be entered here, dismissing the suit. **REVERSED AND DISMISSED.**

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Argued May 6, affirmed July 22, 1919.

STATE OF OREGON v. PACIFIC LIVE STOCK CO.

(182 Pac. 823.)

Equity—Right to Voluntary Nonsuit—Motion Before "Trial."

1. In view of Sections 45, 46, 102, 105, 109, 113, 114, L. O. L., under Section 182, providing that nonsuit may be given against a plaintiff on his motion at any time before trial unless a counterclaim has been pleaded in defense, made applicable to suits in equity by Section 410, plaintiff may take a voluntary nonsuit after a demurrer has been filed and disposed of; the hearing on demurrer not being a "trial" within the meaning of Section 182, which refers to trial on the merits before a jury.

Equity—Right to Voluntary Nonsuit—Counterclaim.

2. In suit by the state to set aside and cancel deeds to state lands on the ground of fraud, affirmative defenses pleaded by defendant, insufficient, considered independent of the original bill, to give defendant ground for affirmative relief, held not such a counterclaim as to prevent plaintiff from taking a voluntary nonsuit before trial on the merits under Section 182, L. O. L., made applicable to suits in equity by Section 410.

From Harney: **DALTON BIGGS, Judge.**

In Banc.

This is a suit brought by the state against the defendant to set aside and cancel the deeds to about fourteen thousand acres of state lands, which had been

conveyed by the state to the defendant, upon the ground of fraud.

The defendant appeared and filed a demurrer to the complaint, upon the ground that it did not "state facts sufficient to constitute a cause of suit," and also upon special grounds stated therein. Thereafter the demurrer was overruled. The defendant then answered with a denial of the essential allegations of plaintiff's complaint, and also pleading certain affirmative defenses, based upon the statute of limitations, and that the defendant was an innocent purchaser, etc., ending with a prayer for the dismissal of the suit, and such other relief as may be meet in the premises.

The case being put at issue, was continued from term to term until about November, 1917, at which time the defendant moved to dismiss the same for want of prosecution. This motion seems to have been undisposed of, and while it was still pending before the court, and on September 11, 1918, the plaintiff came in by the Attorney General, and moved for a dismissal of the cause, without prejudice, and on the same day an order was filed dismissing the cause, from which order the defendant appeals. **AFFIRMED.**

For appellant there was a brief with oral arguments by *Mr. Edward F. Treadwell* and *Mr. John L. Rand*.

For the State of Oregon there was a brief over the names of *Mr. George M. Brown*, Attorney General, and *Mr. John O. Bailey*, Assistant Attorney General, with an oral argument by *Mr. Bailey*.

BENNETT, J.—1. The principal question presented in the case, is as to whether a plaintiff may take a

voluntary nonsuit under the provisions of Section 182, L. O. L., made applicable to suits in equity by Section 410, L. O. L., after a demurrer has been filed and disposed of. The question has been very ably and exhaustively briefed and presented, by the attorneys on each side, and depends entirely upon the construction of the first clause of Section 182, reading as follows:

“A judgment of nonsuit may be given against a plaintiff, as provided in this chapter—on motion of the plaintiff, at any time *before trial*, unless a counterclaim has been pleaded in defense.”

It is strenuously and plausibly urged on behalf of defendant that the hearing upon the demurrer and the decision thereon was a “trial” of an issue of law, and therefore terminated the right to a voluntary nonsuit under said clause, and *Hume v. Woodruff*, 26 Or. 373 (38 Pac. 191), and *Ferguson v. Ingle*, 38 Or. 43 (62 Pac. 760), are cited to support the contention.

The plaintiff, on the other hand, contends that the hearing upon a demurrer is not a “trial” within the meaning of Section 182, where the demurrer is overruled and the defendant answers, thus putting the case at issue; and cites *Hutchings v. Royal Bakery*, 60 Or. 48 (118 Pac. 185), to sustain the contention upon its part.

It seems to us the contention of the plaintiff must be sustained. There can be no doubt under our statute but what the hearing upon a demurrer is some sort of a “trial”: Section 109, L. O. L. But the word was not used in that sense in Section 182, L. O. L.

Section 113, L. O. L., evidently creates and recognizes two distinct meanings of the word “trial.” One is a “trial” of an issue of law, and the other is the “trial of an issue of fact.” That these two classes

of trials are entirely distinct and separate things is very clear by reference to the section following: Section 114, L. O. L. They are tried at different times by separate tribunals. An issue of law is tried before the judge, and an issue of fact is ordinarily tried before a jury.

In other words, the word "trial" as defined in the Code covers two distinct and separate proceedings. It is like many other words in the English language, which have different meanings, and are sometimes used with one meaning and sometimes with the other. Certainly, the legislature had some definite period in the litigation in mind when the right to a voluntary nonsuit should be extinguished.

Here, then, were two separate adjudications to which the word trial might apply. One a preliminary trial by the court of an issue of law, and one a trial upon the merits before a jury. The question is, To which of these did the legislature refer in Section 182? This question we must solve by reference to the context, the subject matter, and the meaning with which the same word "trial" is used by the legislature in other sections of the Code.

That the word is used in the sense of a final trial upon the merits in other sections of the Oregon Code is very plain. Section 45 provides that,—

"The court, or judge thereof, may change the place of trial, etc."

Section 46, L. O. L., provides, this motion can only be made after the cause is at issue upon a question of fact. So it is plain that the word "trial" in Section 45, *supra*, had reference only to the trial of a question of fact upon the merits. Section 102, L. O. L., provides:

“The court may, at any time *before trial*, in furtherance of justice, * * allow any proceeding or pleading to be amended by adding the name of a party, etc.”

It seems perfectly clear that the words “*before trial*” in that section refer to a trial upon the issues of fact. A like use of the word is again made in Section 105. Indeed, in Section 182, subdivision 3, the word “trial” is used three different times by the legislature, and every time with plain reference to a trial on the merits.

It seems to me, that where we find the same word “trial” is used so frequently in other places in the Code and even in the same section, and always, or even generally, with entire reference to a trial on the merits, we may reasonably assume it uses the word in this instance with that meaning.

In *Warm Springs Irr. Dist. v. Pacific Livestock Co.*, 89 Or. 19, 22 (173 Pac. 265), this court had occasion to define the meaning of the word, as used at still another place in the Code, where a provision is made in condemnation proceedings for the fixing of a reasonable attorney’s fee by the court at the “trial.” Mr. Justice BEAN, delivering the opinion of the court, said:

“For various purposes, a hearing on a demurrer is a trial and so is the hearing on the question of attorney’s fee, as suggested by counsel; but does the statute mean such a trial, or does it mean a trial of the subject matter of the action. The subject of the litigation is the damages to the property proposed to be taken. Hearing on demurrer, attorney’s fee, motion, or trial is not ‘the trial’ as to the subject of the litigation, but of matters merely incident to and growing out of the litigation of the subject matter of the action.

"When the lawmakers provided that in such a proceeding a reasonable attorney's fee should be fixed by the court 'at the trial' it is apparent from the examination of the whole section and of all of the provisions for proceedings in condemnation that they had in mind the main or final trial of the cause."

This case was tried *in banc* and the definition of the word "trial," as used in that section, was concurred in by every member of the court.

In *Hume v. Woodruff*, 26 Or. 373 (38 Pac. 191), Mr. JUSTICE BEAN, delivering the opinion of the court, says:

"An issue of law arises upon a demurrer, * * and, since a defendant may demur upon the ground 'that the complaint does not state facts sufficient to constitute a cause of suit' * * it would seem to follow that the determination of an issue presented by such a demurrer, is a trial of the cause within the meaning of the statute * * and, as a consequence, that after the disposition thereof a plaintiff is not entitled to a voluntary nonsuit, unless by leave of the court an amended complaint is filed."

In that case that question was really not before the court, for an amended complaint *had been filed*, and the court held that under the pleadings actually presented, the plaintiff *did* have a right to the voluntary nonsuit.

In *Ferguson v. Ingle*, 38 Or. 43 (62 Pac. 760), the condition was exactly the same, and again the cause was reversed because a voluntary nonsuit had been refused after the demurrer had been sustained, and an amended pleading had been filed.

In *Hutchings v. Royal Bakery*, 60 Or. 48 (118 Pac. 185), the defendant filed a demurrer, which was overruled, as in this case, and the cause came on for trial before a jury. After the jury had been formed and

several witnesses had testified, the plaintiff moved for a voluntary nonsuit and his motion was allowed. After a very careful consideration of the authorities by Mr. Justice BEAN, this action was affirmed.

In that case there was a dissent by Mr. Justice McBRIDE, but as I read the dissenting opinion, it was his judgment also, that the voluntary nonsuit could be taken, up to the time of the commencement of the trial upon the facts. The whole court was apparently unanimous that it did not end with the hearing upon the demurrer, which had been filed and disposed of in that case.

Of course, if the plaintiff could take a voluntary nonsuit at any time *during the trial* on the facts, it follows by stronger reasoning that he could take it at any time before the trial.

It is true this decision was in an action at law, but it seems under Section 404, L. O. L., which makes Section 182 applicable to equity suits, the same reasoning must apply.

The same result seems to have been reached by the entire court in the case of *Currie v. Southern Pac. Co.*, 23 Or. 400 (31 Pac. 964), in which the action had been commenced in the Justice's Court. An answer had been filed, and a *demurrer to the answer*, which was sustained in the Justice's Court. The case was appealed to the Circuit Court and there it came up again and the *demurrer was again argued and submitted*. The Circuit Court overruled the demurrer. The plaintiff then filed a reply and the defendant moved to strike out the reply, thus raising still another issue of law. The motion was denied and the defendant then "demurred to the reply," raising a third issue of law. There was a verdict for the plaintiff. The judg-

ment on this verdict was reversed on appeal, on the ground that the court should not have permitted the filing of the reply, and the court remanded the case for a trial upon the issues presented by the complaint and answer: See same case, 21 Or. 566 (28 Pac. 884). When the case got back to the Circuit Court and being then pending upon the issues of fact, and the demurrer to defendant's answer *still standing as overruled* by the court, and there being no amended pleading filed, the plaintiff moved for a voluntary nonsuit. This was allowed and upon a second appeal the Supreme Court held that the motion *was not too late*. Chief Justice LORD, delivering the opinion, said:

“The Code provides that a nonsuit can be taken by the plaintiff at any time before trial, unless a counterclaim has been pleaded as a defense. * * At common law the plaintiff might take a nonsuit, as of right, at any time in the progress of the trial he might prefer, and thereby reserve to himself the power to bring a fresh action for the same subject matter; and this right continued until after the verdict was rendered, but ended with the entry of the judgment. * * Nonsuits are classed under two divisions: (1) Involuntary, as when ordered by the court against the plaintiff's objection; (2) Voluntary, when allowed by the court on the plaintiff's own motion; * * and it has been uniformly held that a voluntary nonsuit will not deprive a plaintiff of his right to try the case a second time, when, with more favorable conditions, he may attain greater success than in the first case. This explains why nonsuits are so frequent. It has been well said that a ‘nonsuit is like the blowing out of a candle, which a man at his own pleasure may light again.’ * * While there is some difference in the practice of the states, in many it is provided, as in Oregon, that a nonsuit may be taken at any time before the trial. As the case stood, no trial had been had when the nonsuit was asked by the plaintiff and allowed by

the court. BLACK, J., said that 'there is no case which decides that the plaintiff may not become nonsuited on his own motion, or that he may not, if he pleases, discontinue or withdraw his action.' * * Since the plaintiff had the right to take a nonsuit so as to prevent an adjudication on the merits, and to enable him to begin over again if he so desired, no right of the defendant was denied."

If *Hume v. Woodruff* and *Ferguson v. Ingle* are inconsistent with these opinions, they should be considered, it seems, as overruled by the latest decision in *Hutchings v. Royal Bakery Co.*, but I think the point actually decided in the *Hume* case and in the *Ingles* case, and the logic of those decisions, support the *Hutchings* case, although there is an intimation by way of *dictum* in the *Hume* case, which is perhaps, to the contrary. But it was actually decided therein that a voluntary motion for a nonsuit was permissible *after a demurrer had been filed and passed upon*. While it is true, an amended pleading in a cause eliminates the original pleading, yet it could not eliminate *the fact that there had been a trial*, of an issue of law *in the cause*, and, therefore, if the statute is to be construed as prohibiting a voluntary nonsuit, unless it is offered *before a trial upon a demurrer*, the voluntary nonsuit would be logically too late, after such an issue of law had been tried and disposed of in the cause, without regard to the amendment.

It seems to me also that the fact that the meaning of the word "trial," as applied to the decision upon the merits, is one of common use, while the other meaning, as applied to the hearing upon an issue of law, is technical and unusual, is important in concluding as to which sense the word was used in, by the legislature.

In ordinary language we speak of a "trial" of the issues of fact, and of a "hearing" on a demurrer.

Bouvier defines trial as,

"The examination before a competent tribunal, according to the laws of the land, of the *facts* put in issue in a cause. * * The examination of the matter of fact in issue in a cause. The decision of the issue of fact."

As I understand it, the Bar of the state has always in actual practice, recognized and asserted the right of the plaintiff to take a voluntary nonsuit at any time, before the trial on the merits commenced; and it seems to me a decision to the contrary would revolutionize the practice.

In actual practice a general demurrer is filed in nearly every case, in the lower courts. Sometimes this is done, because the complaint is thought to be really defective; sometimes because an inexperienced attorney wishes to save upon the record, any point which may subsequently develop; and quite often it is intended as an appearance to prevent a default, until the attorney is ready to prepare an answer. These demurrers are submitted and formally passed upon by the court, either with or without argument. This occurs at the very commencement of the case. To hold that the submission of these demurrers and the decision of the court thereon terminates the right to a voluntary nonsuit would be to practically destroy that right altogether and render it entirely worthless to the plaintiff. It does not seem to me that the legislature could have intended any such result.

It is not necessary in this case to decide what would be the rule as to dismissal if the defendant stood upon his demurrer, or if the demurrer was sustained, and the plaintiff did not amend. But we hold that where,

in a suit, the defendant has filed a demurrer, which has been overruled, and the defendant has answered, the plaintiff may take a voluntary nonsuit as a matter of course (there being no counterclaim) at any time before the trial of the issues of fact.

The only other question presented in the case is whether or not the defendant had pleaded such a counterclaim, as would prevent the plaintiff from a voluntary dismissal of the case.

2. The only affirmative defenses pleaded are in the nature of laches, estoppel and adverse possession. There is no setting up or pleading of a cloud upon the title, or an adverse claim by the plaintiff. In that regard, if the defendant sought to take advantage of any such adverse claim, he would have to depend upon the allegations of plaintiff's complaint and not upon the allegations of his own pleading.

Neither was there any prayer to have any claim upon the part of the plaintiff adjudicated, or for any claim of affirmative relief of any character, unless that should be implied from the general equity prayer.

While the affirmative defenses set forth in defendant's pleading might perhaps be sufficient as a defense, yet they were not sufficient considered independently of the original bill, to give the defendant ground for affirmative relief.

A counterclaim in an equity suit under our practice is much in the nature of a cross-bill under the old equity practice, and in such a bill the defendant could not rely upon the allegations in the original complaint.

"A cross-bill must be as complete and perfect as an original bill, and must be good within itself, not relying upon reference to the original bill for any of its essential averments": 16 Cyc. 330, § F.

So, under our practice, it is said in *Le Clare v. Thibault*, 41 Or. 601, 608 (69 Pac. 552):

"An answer setting up a counterclaim must contain the substantial requisites of a complaint, and allege facts which legally entitle the defendant to recover in a suit instituted by him for that purpose against the plaintiff; and, if his pleading omits any allegation that would be necessary to state a cause of suit, it will be vulnerable to a demurrer interposed on that ground."

In *Templeton v. Cook*, 69 Or. 313, 317 (138 Pac. 230), it is said:

"A counterclaim permissible in an equity case shall be one upon which a suit might be maintained by the defendant against the plaintiff in the suit."

In *Maffett v. Thompson*, 32 Or. 546, 551 (52 Pac. 565, 53 Pac. 854), it is said:

"In so far as it was designed to afford affirmative relief, the counterclaim here provided for takes the place of the cross-bill under the chancery practice, as it formerly prevailed. * * Under that practice, which still obtains in many jurisdictions, if the cross-bill sets up matters purely defensive, and prays for no affirmative relief, a dismissal of the original bill necessarily disposes of the cross-bill also."

In *Dove v. Hayden*, 5 Or. 500, the question here presented was directly before the court, and the court said:

"The substantial question presented by the motion to dismiss, is, whether any counterclaim to the plaintiff's cause of suit, is set up in the answer. Unless the facts there alleged constitute a counterclaim, the judgment of nonsuit on the motion of plaintiff was properly granted. * * The counterclaim, therefore, which the defendant is authorized to interpose, must be one upon which a suit might be maintained by the defendant against the plaintiff in the suit."

In *Chance v. Carter*, 81 Or. 229, 239 (158 Pac. 947), it is said by Mr. Justice HARRIS:

“Furthermore, while the answer pleads enough to conform to a special provision of the statute applicable to actions in ejectment, nevertheless the pleading does not, strictly speaking, set forth a cause of action, because, if the new matter stood alone, it would not contain all the elements necessary for a cause of action; nor would the new matter in the pleading by itself be a complete statement of a cause of suit. Repeated decisions have declared that a counterclaim must be complete in itself, and state facts which show that the defendant is entitled to recover from the plaintiff if an action had been instituted for that purpose.”

Here, upon an inspection of the answer, it will be noticed, there is no affirmative allegation whatever, that the State of Oregon *was asserting or making any claim to the land in question*, or that any such claim was in any way a cloud upon defendant's title. Is it not perfectly plain that if the defendant was attempting to ask affirmative relief, upon a complaint of its own, in a suit brought independently by it, it would have no cause of suit whatsoever, without such an allegation?

Then when we apply the doctrine presented by Mr. Justice HARRIS in the *Carter* case, and so universally established, that a counterclaim, like a cross-bill, must contain every essential element of the defendant's right to recover, which is necessary in an independent suit. Is it not entirely clear that there was no counterclaim pleaded, and indeed no intention to plead a counterclaim, even if the answer had been in other respects entirely sufficient? In this regard the absence of a prayer for the quieting of title, or the settling of any adverse claim, is significant. Probably such a prayer would not always be necessary if all the

other requisites of a good bill in equity were present; but the absence of such a prayer is strong evidence that there was no intention to plead a counterclaim, and, as it seems to me, a sufficient counterclaim was in fact not pleaded.

In passing upon the case we have not considered the question of whether or not the defendant could maintain any claim for affirmative relief against the state, if the pleadings in that regard were otherwise sufficient. As to this, there is at least very grave doubt, as shown in the opinion of Mr. Justice HARRIS, but to my mind it is so clear that there was no counterclaim pleaded, a decision upon the other question seems unnecessary.

It is urged that the dismissal of this case works a hardship upon the defendant, since it leaves an uncertainty in regard to the title to all of that large tract of land included in the first complaint and not included in the second. We hardly see how the condition of the defendant, in that regard, can be any worse than it would have been if the original suit had not been brought in the first place. The embarrassment, if any, seems to arise from the fact that the defendant cannot, under our Constitution and laws, bring an independent suit against the state to adjudicate its title. But this is a matter for the legislative power of the state, with which we cannot interfere.

The judgment of the court below should be affirmed.

AFFIRMED.

HARRIS, J.—I concur in the conclusion reached by Mr. Justice BENNETT; but I base my conclusion upon different grounds.

On April 10, 1914, the State of Oregon commenced this suit against the Pacific Live Stock Company for

the avowed purpose of bringing about a cancellation of deeds covering about 26,000 acres of land, claiming that the land had been fraudulently acquired by "dummies." On May 2, 1914, the defendant demurred to the complaint; and subsequently on December 31, 1914, the court overruled the demurrer. Afterwards, on February 5, 1915, the defendant filed an answer which, besides admissions and denials, affirmatively alleged that the plaintiff had been guilty of laches, that the defendant was a *bona fide* purchaser for value, and that the defendant was and had been in adverse possession for more than ten years. The answer concluded with a prayer for costs and for "such other relief as may be meet in the premises." On June 7, 1915, the state filed a reply containing admissions, denials and affirmative allegations, thus completing the issues.

On September 11, 1918, the state moved for a dismissal of this suit "without prejudice" on the alleged ground that state officials had recently discovered that "much of the land involved in the case was acquired by forging real and fictitious persons' signatures to the applications and deeds, and the complaint filed" in 1914 was not in the opinion of counsel for the state "broad enough to permit the introduction of evidence of such character and, therefore, it became necessary either to amend said complaint or to file a new complaint, and in order to prevent delay of filing a motion for permission to file an amended complaint, it was deemed advisable to dismiss the present suit and start a new suit." The motion was allowed by the court and the suit was "dismissed without prejudice"; and subsequently the state began another suit attacking the deeds to about 19,000 acres of the 26,000. In other words, this the first suit attacks the paper title

to 26,000 acres of land; while the second suit attacks the paper title to 19,000 acres and makes no mention of the remaining 7,000 acres of land. The defendant moved to set aside the order of dismissal, and, when the Circuit Court overruled the motion, the defendant appealed.

It is vigorously contended that the Circuit Court was without lawful authority to dismiss the suit "without prejudice" because: (1) there had been a trial; and (2) the defendant had pleaded a counterclaim in its answer. This contention is based upon certain sections of the Code. Section 182, subdivision 1, L. O. L., provides that a judgment of nonsuit may be given against the plaintiff "on motion of the plaintiff, at any time before trial, unless a counterclaim has been pleaded as a defense." Section 410, L. O. L., declares that a decree dismissing a suit may be given against the plaintiff in the case specified in Section 182, subdivision 1; and "such decree is a determination of the suit, but shall not have the effect to bar another suit for the same cause, or any part thereof." Relying upon the holdings in *Hume v. Woodruff*, 26 Or. 373 (38 Pac. 191), and *Ferguson v. Ingle*, 38 Or. 43 (62 Pac. 760), the defendant argues that the ruling upon the demurrer was a trial within the meaning of Section 182, L. O. L., and within the meaning of the term "trial" as it is expressly defined in Section 113, L. O. L. In the opinion of the writer the state cannot, because of its status as a sovereign, be compelled to continue the litigation against its will; and consequently it is utterly immaterial whether the decision upon the demurrer was or was not a trial within the meaning of Sections 182 and 410, L. O. L., and it is likewise immaterial whether the answer does or does

not contain a counterclaim within the meaning of Section 182, subdivision 1, L. O. L.

The State of Oregon is a sovereign and because of that fact cannot be sued in its own courts without its consent. Indeed, the state can withdraw its consent after it has once given it: *State ex rel. v. Jumel*, 38 La. Ann. 337, 339. So puissant is the state and so completely immune from attack in its own courts is the sovereign state that it can withdraw its consent and by that act alone terminate a pending suit against it although such suit was originally begun with the express consent of the state. This doctrine finds concrete illustration in *Beers v. State of Arkansas*, 20 How. 527 (15 L. Ed. 991). An action was brought in a Circuit Court of the State of Arkansas to recover the interest due on certain bonds issued by the state. The state Constitution empowered the legislature to provide by law "in what courts and in what manner suits may be commenced against the state." In pursuance of that provision of the Constitution a law was passed permitting the prosecution of suits against the state. Acting upon the faith of that law the action was begun in the Circuit Court on November 21, 1854; but afterwards on December 7, 1854, while the action was still pending in the Circuit Court, the legislature passed a statute providing that in all suits brought to enforce the collection of any bonds issued by the state such bonds should be filed in the office of the clerk and upon failure to file the bonds at a designated time the court was required to dismiss the suit. The holder of the bonds involved in the suit against the State of Arkansas refused to file them and thereupon the suit was dismissed. In the course of its opinion the Supreme Court of the United States used this language:

"It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

Again, in the same opinion the court said:

"Nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the state, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed."

The broad doctrines announced in *Beers v. Arkansas* are recognized and followed in *State v. Bank of Tennessee*, 62 Tenn. (3 Baxt.) 395, 399, 406.

The Code provides that in addition to denials the answer may contain "a statement of any new matter constituting a defense or counterclaim" (Section 73, L. O. L.); and the Code also states that—

"The counterclaim mentioned in Section 73 must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action * * *": Section 74, L. O. L.; Section 395, L. O. L.

In section 401, L. O. L., we read:

"The counterclaim of the defendant shall be one upon which a suit might be maintained by the defendant against the plaintiff in the suit."

A counterclaim in equity must be connected with the subject of the suit and contain such an averment of facts as to authorize the defendant to maintain a suit thereon against the plaintiff: *Le Clare v. Thibault*, 41 Or. 601, 606 (69 Pac. 552); *Templeton v. Cook*, 69 Or. 313, 317 (138 Pac. 230). Affirmative matter pleaded in an answer may be either defensive or offensive or both defensive and offensive: *Griffin v. Jorgenson*, 22 Minn. 92, 95; *Haaland v. Miller*, 67 Or. 346, 350 (136 Pac. 9). If the answer is defensive only and does not ask for affirmative relief a dismissal of the complaint carries with it the answer and suit; but if the answer contains a counterclaim within the meaning of the Code a dismissal of the complaint, as distinguished from a dismissal of the suit, does not carry the answer with it, for the reason that a mere dismissal of the complaint leaves the case to be determined upon the counterclaim: *Maffett v. Thompson*, 32 Or. 546, 551 (52 Pac. 565, 53 Pac. 854); *Tokstad v. Daws*, 68 Or. 90 (136 Pac. 844). A counterclaim then, within the meaning of our Code, is in effect a suit prosecuted by the defendant against the plaintiff.

Turning now to the answer filed by the Pacific Live Stock Company, it will be seen that all the affirmative matter operates defensively while some of it serves not only as a defense but also as a counterclaim and to the extent that such new matter is treated as a counterclaim it would, if sustained by the evidence terminate in a decree granting affirmative relief to the company. But a judgment or decree cannot be rendered against the state unless there is an express statute permitting it: *People v. Miles*, 56 Cal. 401, 402; *People v. Dennison*, 84 N. Y. 272, 281; *State v. Arkansas Brick & Mfg. Co.*, 98 Ark. 125 (135 S. W. 843, 33 L. R. A. (N. S.) 376). In effect, the state asks that

it be decreed to be the owner of the land; and so, also, to the extent that the answer is treated as a counterclaim, assuming that a counterclaim is sufficiently pleaded, the company asks that it be decreed to be the owner of the land. Stated in broad terms, a citizen when sued by the state can plead whatever will operate to defeat the claim of the state; but a pure counterclaim cannot be pleaded and prosecuted to a decree or judgment against the state unless the state has given its consent to the rendition of an affirmative judgment for money or an affirmative decree for relief against the state, for the reason that the prosecution of the counterclaim to an affirmative decree or judgment for the defendant would be equivalent to prosecuting a suit against the state: *Holmes v. State*, 100 Ala. 291, 294 (14 South. 51); *Industrial School v. Reynolds*, 143 Ala. 579 (42 South. 114); *People v. Miles*, 56 Cal. 401; *State v. Gaines*, 46 La. Ann. 431 (15 South. 174); *State v. Leckie*, 14 La. Ann. 636; *State v. Baltimore & Ohio R. R. Co.*, 34 Md. 344, 374; *Auditor General v. Bay County*, 106 Mich. 662 (64 N. W. 570); *Aplin v. Grand Traverse County*, 73 Mich. 182 (41 N. W. 23, 16 Am. St. Rep. 576); *People v. Corner*, 59 Hun, 299 (12 N. Y. Supp. 936) (affirmed in 128 N. Y. 640, 29 N. E. 147); *State v. Corbin & Stone*, 16 S. C. 533, 543; *Borden v. Houston*, 2 Tex. 594; *Bates v. The Republic*, 2 Tex. 616.

In this jurisdiction the distinctions between actions at law and suits in equity are preserved. The term "counterclaim" as defined by our Code includes not only "recoupment" but also "setoff": Bliss on Code Pleading (3 ed.), §§ 367, 370; *Krausse v. Greenfield*, 61 Or. 502, 508 (123 Pac. 392, Ann. Cas. 1914B, 115); and it is possible that in an action at law a citizen can, when sued by the state, plead a counterclaim amount-

ing to a setoff as well as a counterclaim amounting to a recoupment for the purpose of preventing the state from obtaining a judgment against him, although he cannot on the basis of that counterclaim secure an affirmative judgment against the state. However, it is not necessary to attempt to decide whether the citizen can plead what is technically known as a setoff against a money demand; nor need we endeavor to determine how far a setoff can be used, if available at all.

This is a suit in equity and if the litigation were between individuals the decree as to any given acre of land would either be wholly for the plaintiff or wholly for the defendant or possibly a dismissal and a denial of relief entirely. The court cannot grant the company affirmative relief unless that relief is based upon its counterclaim, assuming that the answer sufficiently pleads a counterclaim, and the defendant cannot plead such a counterclaim, unless the state has consented to the prosecution of a suit against it. The Constitution expressly provides that—

“Provision may be made by general law for bringing suit against the state, as to all liabilities originating after or existing at the time of the adoption of this Constitution”: Article IV, Section 24.

If it be assumed that the answer contains a counterclaim and if it be further assumed that the assumed counterclaim embraces a “liability” within the meaning of the Constitution, nevertheless the legislature has not enacted any law permitting the prosecution of an action or suit against the state in its own courts; and hence if the state has consented at all it is only an implied consent derived from the fact that the state itself began a suit. Although the state cannot be sued without a law permitting such suit, yet no statute is necessary to enable the state to institute a suit: *State*

ex rel. v. Duniway, 63 Or. 555, 559 (128 Pac. 853); and while it is true that the state, when it comes into court, must in the main follow the same procedure which an ordinary suitor is required to observe, nevertheless this general statement is subject to the qualification that there is at all times present the fundamental principle that the state cannot be sued without its consent: *State ex rel. v. Holgate*, 107 Minn. 71 (119 N. W. 792). Immunity from suit is a prerogative right of the sovereign; Sections 182 and 410, L. O. L., are general statutes which do not expressly name the state; and before it can be said that the state has surrendered its high prerogative it ought to be made expressly to appear or at least by clear and necessary implication, that the general statute relinquishes the prerogative: *People v. Miles*, 56 Cal. 401; *People v. Dennison*, 84 N. Y. 272, 280; *State v. Arkansas Brick & Mfg. Co.*, 98 Ark. 125 (135 S. W. 843, 33 L. R. A. (N. S.) 376); *Raymond v. State*, 54 Miss. 562 (28 Am. Rep. 382); *Industrial School v. Reynolds*, 143 Ala. 579, 585 (42 South. 114); *State v. Baltimore & Ohio R. R. Co.*, 34 Md. 344, 374; *Chevallier's Admr. v. State*, 10 Tex. 315. See, also, *State Land Board v. Lee*, 84 Or. 431, 434 (165 Pac. 372). Nor does the state abandon its sovereign prerogative and impliedly consent to being sued when it institutes a suit in its own behalf: *People v. Dennison*, 84 N. Y. 272, 282. In most of its important features the case of *Moore v. Tate*, 87 Tenn. 725 (11 S. W. 935, 10 Am. St. Rep. 712), closely resembles the case presented here; and the reasoning employed here and the conclusion reached here completely harmonize with the reasoning and conclusion reached in that precedent.

The following adjudications give additional support to the doctrine that an affirmatively operating judg-

ment or decree cannot be rendered against a state unless permission is expressly given by statute: *United States v. Eckford*, 6 Wall. 484 (18 L. Ed. 920); *De Groot v. United States*, 5 Wall. 419, 431 (18 L. Ed. 700); *Reeside v. Walker*, 11 How. 272 (13 L. Ed. 693); *United States v. Warren*, 12 Okl. 350 (71 Pac. 685).

This suit was commenced by the constituted authorities of the state and by analogy to the rule applied in *Beers v. Arkansas*, 20 How. 527 (15 L. Ed. 991), the same constituted authorities may withdraw the suit in the absence of a statute expressly naming the state or at least by necessary implication naming it as one of the parties who cannot be granted a voluntary judgment of nonsuit. The statute which prevents a voluntary judgment of nonsuit before trial or after a counterclaim has been pleaded does not expressly or by necessary implication name the state; and hence there is no statute denying to the court jurisdiction to dismiss this suit. The Constitution delegated to the legislature authority to consent to the prosecution of suits against the state and the very language of the organic act contemplates express legislation. The legislature has not expressly consented; the Governor and attorney general cannot by their act in bringing this suit impliedly do what the Constitution indicates shall, if done at all, be expressly done by its sole agents for that purpose, the lawmakers.

There are a few adjudications which in varying degrees differ from the conclusion expressed here; but as the writer reads them, those few adjudications fail to give full recognition to the controlling and all-pervading principle that lies at the very foundation of sovereignty.

Of course, if the state institutes a suit in equity and prosecutes it to a finality and the suit terminates in a

dismissal after a trial on the merits, the state, to the same extent as an individual, would be barred from maintaining a second suit.

The decree of dismissal should be affirmed.

BURNETT, J., Dissenting.—On April 14, 1914, the State of Oregon as plaintiff filed in the Circuit Court for Harney County its complaint whereby it sought to set aside some sales of state lands in sections 16 and 36, to which the defendant had acquired title by mesne conveyances, the ground for suit being to the effect that the original purchaser acquired title to the lands by means of false and fraudulent applications, the particulars of which are related in the complaint. The prayer was that the conveyances be set aside, that the lands be declared to be the property of the plaintiff and that the defendant Pacific Live Stock Company be required to convey the lands to the state. On May 2, 1914, the defendant demurred to the complaint on various grounds stated, among others, that the complaint does not state facts sufficient to constitute a cause of suit against the defendant. After an oral argument before the court on the issue of law thus involved, this demurrer was overruled on December 31, 1914. The defendant was allowed forty days within which to file its answer and on February 5, 1915, it did file an answer, denying all the allegations of fraud and setting up laches of the plaintiff, death of the defendant's grantors and predecessors in interest whereby it had become impossible to obtain their testimony in support of the defendant's title, and further alleged that it had acquired the property in good faith, for a valuable consideration and without any knowledge or information concerning any fraud in its original acquisition from the state. It further

stated that the defendant had been in possession of the property openly, notoriously, exclusively and uninterruptedly for more than ten years prior to May 22, 1903; that neither the State of Oregon nor its grantors had been seised or possessed of any of said premises within ten years prior to that date, and it also alleged that for more than ten years before May 22, 1903, and ever since that time the defendant has been in the open, notorious, exclusive and uninterrupted possession of the property and the whole thereof, claiming the same adversely to the plaintiff and to all the world, and possessing the same under a claim of right, without any interruption, whereby it had acquired title by prescription as against the State of Oregon.

The prayer appended to the answer reads thus:

"Wherefore said defendant prays that said plaintiff take nothing by its suit and that defendant recover its costs herein expended and have such other relief as may be meet in the premises."

On April 6, 1915, the plaintiff filed its motion to make certain allegations in the answer more definite and certain, but this motion was overruled and thereafter on June 7, 1915, the plaintiff filed its reply. The case stood thus until September 11, 1918, when there was entered an order dated August 24, 1918, reading as follows:

"Now at this time this matter coming on the motion of George M. Brown, Attorney General, and J. O. Bailey, Assistant Attorney General, representing the State of Oregon, for an order dismissing the suit heretofore and in 1914, instituted by the State of Oregon against the Pacific Live Stock Company, and it appearing to the Court that no affirmative relief is asked by defendant in its answer,

"Now, therefore, it is ordered, that said suit be and the same is hereby dismissed without prejudice."

On September 23, 1918, the defendant moved the court to set aside and vacate its order of August 24, 1918, entered September 11th of that year, and the motion was heard and submitted on September 30, 1918, whereupon the Circuit Court entered the following order:

"In the above-entitled cause the plaintiff having moved the Court to dismiss the said suit without prejudice, and said motion having been granted, now, therefore, it is hereby adjudged that said suit be dismissed without prejudice and that defendant recover its costs of suit herein expended, taxed at \$16.50."

From this last order the defendant appeals.

The following sections of Lord's Oregon Laws are here set down as affecting the matters involved:

"Section 410. A decree dismissing a suit may be given against the plaintiff in any of the cases specified in subdivisions 1, 2, and 3 of Section 182, except the last clause of such subdivision 3. Such decree is a determination of the suit, but shall not have the effect to bar another suit for the same cause, or any part thereof.

"Section 182. A judgment of nonsuit may be given against the plaintiff as provided in this chapter,—

"1. On motion of the plaintiff, at any time before trial, unless a counterclaim has been pleaded as a defense;

"2. On motion of either party, upon the written consent of the other filed with the clerk;

"3. On motion of the defendant, when the action is called for trial, and the plaintiff fails to appear, or when after the trial has begun, and before the final submission of the cause, the plaintiff abandons it, or when upon the trial the plaintiff fails to prove a cause sufficient to be submitted to the jury.

"Section 109. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds,—

"1. Of law; and,

"2. Of fact.

"Section 110. An issue of law arises upon a demurrer to the complaint, answer, or reply, or to some part thereof.

"Section 112. Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law shall be first tried, unless the court otherwise direct:

"Section 113. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact."

In addition to the issues of law arising upon demurrer it may be stated that an issue of law arises also upon a motion for judgment on the pleadings, under Section 79, L. O. L., or for a judgment notwithstanding the verdict, under Section 202. It is within the legislative power to make a definition of its own of any term used in its enactments. The statute declares a trial to be a judicial examination of issues, whether they be of law or fact, and we are concluded by this definition. We cannot invent one of our own or be bound by those of the lexicographers. Hence, when the court in the exercise of its judicial function examined and decided the issue of law arising upon the demurrer to the complaint, there was a trial within the meaning of the statute. The motion for voluntary nonsuit at any time after this trial was too late, because Section 182, made applicable to suits in equity by Section 410, says that it must be "at any time before trial," if the nonsuit is to be granted on the motion of the plaintiff. The language used in this section does not make any distinction between the kinds of

trial, whether they be upon issues of law or of fact. Whichever it be, it forecloses the right to take a voluntary nonsuit: *Hume v. Woodruff*, 26 Or. 373 (38 Pac. 191); *Ferguson v. Ingle*, 38 Or. 43 (62 Pac. 760).

Section 101, L. O. L., reads thus:

"After the decision upon a demurrer, if it be overruled, and it appears that such demurrer was interposed in good faith, the court may in its discretion allow the party to plead over upon such terms as may be proper. If the demurrer be sustained, the court may in its discretion allow the party to amend the pleading demurred to, upon such terms as may be proper."

In *Alley v. Nott*, 111 U. S. 472 (28 L. Ed. 491, 4 Sup. Ct. Rep. 495), the Supreme Court of the United States had under consideration the question of whether a cause could be removed from the courts of the State of New York to the Federal Court. The federal statute in force at the time required that the petition for removal should be filed "at or before the term at which said cause could be first tried, and before the trial thereof": Act Cong. March 3, 1875, c. 137, § 3, 18 Stat. 471. The Code of New York is substantially like ours, including the provision that upon the decision of a demurrer the court in its discretion may allow the party in fault to plead anew or amend on such terms as may be just. The defendants had demurred to the complaint and their demurrers were overruled. They then appealed, but afterwards withdrew their appeals and their demurrers, filed answers, and at this stage of the litigation applied for the removal of the suit to the Federal Court. Speaking of this situation the Supreme Court of the United States, through Mr. Chief Justice WARRE, used this language:

"A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action, is

equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if a final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action. Under such circumstances, the trial of an issue raised by a demurrer which involves the merits of an action is, in our opinion, a trial of the action within the meaning of the act of March 3, 1875. * * The situation of the case at this time, for the purposes of removal, was precisely the same as it would be if the trial, instead of being on an issue of law involving the merits, had been on an issue of fact to the jury, and the court had, in its discretion, allowed a new trial after a verdict. We can hardly believe it would be claimed that a removal could be had in the last case and, in our opinion, it cannot in the first."

In *Walker v. Maronda*, 15 N. D. 63 (106 N. W. 296), the statute affecting Justices' Courts provided that "the court may at any time before trial, on motion, change the place of trial" (Rev. Codes 1899, § 6652), in certain cases. Like ours, the Code of that state declared that—

"a trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact": Section 5419.

The Supreme Court there held that the hearing and determination of the issue of law raised by a demurrer to the complaint in a Justice's Court is a trial, so that it is too late after the decision on the demurrer for a party to apply for a change of venue.

An instructive, well-considered case is that of *Goldtree v. Spreckels*, 135 Cal. 666 (67 Pac. 1091), where it was held that where a complaint contains three alleged causes of action, and defendant demurs thereto, and the demurrer is sustained as to two of the cases and overruled as to the third, and defendant answers the third cause of action, and plaintiff dismisses as to it, and does not amend his complaint, there is a trial, and he cannot afterward dismiss the entire action but judgment may be rendered for defendants as to the issues raised by demurrer.

The case of *Warm Springs Irr. Dist. v. Pacific Live Stock Co.*, 89 Or. 19 (173 Pac. 265), was an instance in which plaintiff was proceeding in eminent domain to condemn certain realty belonging to the defendant. The latter had answered and claimed an attorney fee under the condemnation statute. This presented a question of fact and could be determined only at a trial of the fact, but the court permitted the plaintiff to dismiss its suit without prejudice. This, of course, forestalled a trial of the issue of fact and necessarily the court arrived at the conclusion that an attorney fee was not allowable. There was no trial whatever and no stage of the litigation at which an attorney fee could be allowed and hence the nonsuit was taken before trial. The case is not an authority for the doctrine that trial in any place mentioned in the Code means only the trial of an issue of fact. The language of Mr. Chief Justice WARRE in *Alley v. Nott*, 111 U. S. 472 (28 L. Ed. 491, 4 Sup. Ct. Rep. 495), disposes of the statement, not necessary for the decision of the Warm Springs Irr. District case, that hearing on a demurrer is merely incidental to the action. A general demurrer does, indeed, go to the merits of the case on a question of law. Neither can we be bound by the slovenly

practice that may have grown up in some parts of the state, that a demurrer can be interposed merely for the purpose of delay. The statute expressly makes the right to plead over or answer depend upon whether or not the demurrer was interposed in good faith. It is a condition upon which alone the court is authorized to grant the desired permission.

Reference to the original records on file in this court in *Currie v. Southern Pac. Co.*, 21 Or. 566 (28 Pac. 884), shows that the statement of *Currie v. Southern Pacific Co.*, found in 23 Or. 400 (31 Pac. 964), is not altogether accurate. In the latter opinion the case is stated as if the issues of law were all presented by motion, whereas in fact there were demurrers to the separate answers of the defendant in a Justice's Court. But, however that may be, the court held in substance in the second opinion that the effect of the reversal on appeal to this court was to return the cause to the Circuit Court for a trial *de novo*, putting the litigation into the same condition in the Circuit Court as if no judicial action had been taken. That this construction of the opinion in the Currie case is right is shown by this language of Mr. Chief Justice LORD:

"There had been a mistake, as this court held, but when the judgment was reversed and the cause remanded, it stood on the docket as though no proceedings had been had therein. It was there precisely for trial *de novo* as it came from the Justice's Court, and the plaintiff could either take a nonsuit or take the consequences of any further proceedings."

The true meaning of this language is that on account of erroneous ruling in the Circuit Court there had been not a trial, but a mistrial, and when this was set aside the case was left as if there had been no trial, so that upon the reasoning of Mr. Chief Justice LORD the case

is only an authority to the effect that there had been no trial to prevent the taking of a nonsuit. It is true that *Hutchings v. Royal Bakery*, 60 Or. 48 (118 Pac. 185), ignores the fact that there had been a demurrer heard and determined before the voluntary nonsuit was permitted. This is the only case in the decisions of this court which apparently supports the doctrine that a nonsuit can be taken after the trial involved in the decision of a general demurrer. It should be disregarded as against the weight of authority, including the express language of the Code.

It is argued that for the purposes of nonsuit, the term "trial" must be restricted to the trial of an issue of fact and it is urged that Sections 45 and 46, L. O. L., relating to the change of place of trial, uphold this doctrine. Changes of venue in actions at law usually are made because the action was commenced in the wrong county, or to subserve the convenience of parties and witnesses or to avoid prejudice of the inhabitants or of the trial judge: Section 45, L. O. L. An action must be at issue on a question of fact: Section 46; but the change of venue in a suit must be made before the answer is filed: Section 397. To change the place of trial of an issue of fact does not make the examination and decision of an issue of law any less a trial. The sections mentioned contain nothing infringing upon or differentiating the definition of "trial" as found in Section 182, and Section 46 says that the change of place of trial shall not be allowed in any action, "until after the cause is at issue on the question of fact only." It certainly cannot be that after the place of trial had been changed in any instance a party would be precluded from moving the court for a judgment on the pleadings or for a judgment notwithstanding the verdict, both of which clearly

present issues of law which must be tried by the court. The place where it is conducted is not one of the elements of the definition of trial and the issue to be tried, whether of law or fact, may arise, especially in a suit, after the change of venue.

It is clear from the weight of authority, as well as from the express provision of the Code, that the hearing and decision of the court on a general demurrer constitute a trial. It remains to determine whether the state, as a voluntary litigant, is exempt from any of the rules of procedure which it has prescribed through the legislative department of the government. It is manifest that without its permission the state cannot be sued in any court, for this would be an infringement of its sovereignty. But there is a distinction to be drawn between the assertion of a claim against the state without its consent and the application in behalf of a defendant of the rules of procedure which the state itself has adopted. In the latter instance there is no impairment of the sovereignty of the state. It is only a recognition of the sovereign act of the state embodied in its legislation. Most of the cases cited by Mr. Justice HARRIS in support of his conclusion that this case must be determined without reference to whether or not there was a trial within the meaning of our Code, are instances where the consent of the state to be sued was withdrawn by subsequent legislation. For example, *State ex rel. v. Jumel*, 38 La. Ann. 337, depended upon the withdrawal of the right to sue the state by a new constitution and legislation in pursuance thereof. Before the adoption of this constitution and laws mentioned, there was a right to sue the state, but the court there held that the legislation in question took it away. In *Beers v. Arkansas*, 20 How. 527 (15 L. Ed. 991), the state had

allowed itself to be sued and an action was commenced on certain state bonds. While the litigation was pending the legislature passed a law requiring such bonds to be deposited in court under penalty of the dismissal of the action, and this was held to be a valid exercise of the legislative power amounting to a limitation upon the state's previous consent to be sued. In *State v. Bank of Tennessee*, 62 Tenn. (3 Baxt.) 395, the withdrawal of the state's consent to be sued was by legislative enactment. These cases do not hold that in the absence of further legislation is not bound by its own rules of procedure when it institutes an action or suit. They only teach what we will agree upon, that the state cannot be sued without its consent and that the legislative branch of the government may withdraw that consent.

In *United States v. Diamond Coal & Coke Co.* (C. C. A.), 254 Fed. 266, Judge SANBORN states the principle thus:

"The equitable claims of a nation or a state appeal to the conscience of a chancellor with the same, but with no greater or less force, than would those of a private citizen under like circumstances, and, barring the effect of mere delay, they are judicable in a court of chancery, to whose jurisdiction the nation or state voluntarily submits them, by every principle and rule of equity applicable to the rights of a private citizen under similar circumstances."

State ex rel. v. Kennedy, 60 Neb. 300 (83 N. W. 87), was a case of *quo warranto* between the appointees of the Governor of the state and those of the mayor for fire commissioners of the City of Omaha. The contention was that when the Governor's appointees were attacked it was in effect an action against the state. Speaking about this, quoting from the syllabus, the court said:

“When a state invokes the judgment of a court for any purpose, it lays aside its sovereignty and consents to be bound by the decision of the court, whether such decision be favorable or adverse. Courts possess a portion of the sovereign power; they are authorized by the constitution to decide between litigants; and the authority to decide implies always, power to make their judgments effective.”

State v. Cloudt (Tex. Civ. App.), 84 S. W. 415, was an instance where the State of Texas sued the defendant for taxes on some land. He pleaded in bar a judgment in an action by the state against his predecessor in interest for taxes on the same land, which was settled by compromise, giving the state a judgment for half of its then claim. Here follows an excerpt from the opinion:

“When a state appears as a party to a suit, she voluntarily casts off the robes of her sovereignty, and stands before the bar of a court of her own creation in the same attitude as an individual litigant; and her rights are determined and fixed by the same principles of law and equity, and a judgment for or against her must be given the same effect as would have been given it had it been rendered in a case between private individuals.”

In *King v. Harris*, 134 Ark. 337 (203 S. W. 847), the plaintiff, claiming as heir of S. S. Smith, deceased, brought ejectment against the occupant of the land in question, which was formerly owned by Smith. The state intervened and answered, setting up some escheat proceedings whereby it claimed the land. One of the defendants was a former administrator of Smith's estate. Another was tenant of the State of Arkansas under agreement with the prosecuting attorney. The trial court dismissed the action on the ground that

it was substantially one against the state. The opinion uses this language:

"The state has in effect become a party plaintiff [defendant] to this litigation, and the court should not thereafter have dismissed the complaint for the reason assigned; i. e., that it was a suit against the state. The state's sovereignty is in no manner involved in this litigation. At its own election and through its prosecuting attorney it became a party to private litigation, which involved the title to a tract of land which had been owned by appellant's ancestor at the time of the ancestor's death."

While in the case before it the court declined to review the escheat proceedings under which the state claimed, it held that as the claimant had challenged their regularity in opposition to the state's intervention he was entitled to a trial of the issue thus joined. As narrated in *Port Royal & A. Ry. Co. v. South Carolina* (C. C.), 60 Fed. 552, the State of South Carolina began a suit in its state court against the company. The cause was removed to the federal court, where the company filed its cross-bill. Service of process was made upon the attorney general of the state. On a motion to set aside the service and dismiss the cross-bill because it amounted to a suit against the state, the court said:

"A sovereign state cannot be forced into court against her consent; but a cross-bill presupposes that the plaintiff is already in court rightfully, and when the state comes into court of her own accord, and invokes its aid, 'she is, of course, bound by all the rules established for the administration of justice between individuals.' * * As by her own volition she is already in court, and as the cross-bill is but a part of the defense to her suit, ancillary to and dependent upon it, we hold that she has by her own act subjected herself to all the rules established for the administration

of justice between individuals, and must make her defense to this cross-bill."

This case is cited with approval in *United States v. Devereux*, 90 Fed. 182 (32 C. C. A. 564). *United States v. Beebee* (C. C.), 17 Fed. 36, was a suit to set aside some land patents on the ground that they were obtained by fraud. The syllabus reads thus:

"Lapse of time may be a sufficient defense to a suit instituted in the name of the United States. When the government becomes a party to a suit in its courts, it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants."

Brundage v. Knox, 279 Ill. 450 (117 N. E. 123), was an instance where the plaintiff suing for the State of Illinois as its attorney general, charged the defendants with appropriating parts of the bed of Lake Michigan by erecting thereon certain structures. Knox filed a cross-bill claiming the land as an accretion to his upland and prayed that his title be quieted. The following is an extract from the syllabus:

"The constitutional provisions exempting the state from suit are substantially based on the doctrine of the common law and rest upon public policy, but where the state is the complainant a defendant will not be prevented from filing a cross-bill."

In the course of its opinion the court quotes with approval from 26 Am. & Eng. Ency. Law (2 ed.), 492:

"A state, when it brings a suit against citizens or other parties, accepts all the conditions that affect ordinary suitors, except that no affirmative judgment, as for the payment of costs, can be had against it."

In *State v. Moore*, 77 W. Va. 325 (87 S. E. 367), the State of West Virginia had sued for some land

claimed by the defendants. There were no costs or disbursements decreed against the defendants on appeal, but after the return of the cause to the Circuit Court that court rendered an additional judgment against them for costs and disbursements and they brought a bill of review to correct the judgment. Answering the contention that this was a suit against the state, the court said:

"It would be a strange doctrine, and one fraught with wonderful consequences, if in construing Section 35, of Article VI, of our Constitution, we were obliged to hold that where the state herself sues, and invokes the aid of her courts in maintaining her rights, a humble citizen thus haled into court can never have the errors in decrees in her favor corrected by bill of review or by appellate process."

In *Commonwealth v. Helm*, 163 Ky. 69 (173 S. W. 389), the court held:

"It may also be confidently affirmed that, when the commonwealth comes into court to prosecute a suit it occupies, in the absence of some controlling statute on the subject, the attitude of any other litigant, and is subject to the same rules of practice and procedure."

Commonwealth v. Barker, 126 Ky. 200 (103 S. W. 303), is authority for allowing a defendant to set up a counterclaim against the state's money demand, although he could not have sued the state upon it by an original suit.

The judiciary is a department of the government having dignity and sanction equal to that of any other branch of the government. It is bound by the rules of procedure established by legislation for the control of litigation before it. When the state, operating through its administrative or executive department, voluntarily appears in court seeking the aid of the judiciary for the enforcement of its proprietary rights,

it must be bound by the procedure prescribed for any other litigant. It cannot select part of that procedure and ignore the rest. Equal and exact justice requires that a court should treat all litigants alike under the same circumstances. It is not accurate to say that in such cases the state is bound merely "in the main" by the rules of procedure. Such a statement is not characterized by that precision which should be used in judicial utterances. Moreover, the declaration that "a judgment or decree cannot be rendered against the state unless there is an express statute permitting it," is too general in its scope. Having come into court and challenged the defendant to a trial of an issue, the state, like any other litigant, must submit to the decision of its judicial department and the defendant in common with the state is entitled to a determination of the issue which will be binding on both parties. To say without restriction or qualification that no judgment or decree can be rendered against the state unless there is an express statute permitting it, would be to assume that no matter what litigation the executive department might institute, there never could be a determination thereof which could be pleaded in bar against a subsequent suit for the same purpose. It would be to deny to the defendant the equal protection of the laws and subject it to the caprice of every succeeding state administration.

People v. Miles, 56 Cal. 401, was an action by the state on a building bond given by contractors who built the prison at Folsom. The court there indeed held that the defendant could not obtain an affirmative judgment against the state, but on rehearing held that a judgment should be directed for the defendant against the state to the effect that the "plaintiff has no cause of action against the defendants or either of

them," but without costs. In *United States v. Warren*, 12 Okl. 350 (71 Pac. 685), it was held that when the United States sues, it waives exemption so far as to let in a setoff to the extent of its demand, but no further, and judgment was directed to the effect that the United States take nothing by its action. In the case of *The Siren*, 7 Wall. 152 (19 L. Ed. 129), Mr. Justice FIELD used this language:

"But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of setoffs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of the defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."

It is clear that there was a trial on the general demurrer to the complaint; that the state, as it came voluntarily into court as a suitor, is bound by the rules of procedure which itself has prescribed, the same as any other litigant; that this is not an infringement of its sovereignty, but in obedience to its sovereign mandate as expressed in its laws; that when it institutes litigation against the defendant it is bound by its own rules, and it follows that the court may render a decision on the issues formed which will bind not only the defendant but also the state as a plaintiff, and finally, that since there has been a trial, the plaintiff, like any other litigant, was too late in its application for a voluntary nonsuit. To hold otherwise would be to give to the administrative department the authority to

withdraw the consent of the state at pleasure either partially or wholly without reference to the statute which governs all alike and without reference to its being a legislative question. It is not within the election of the administrative department to claim the benefits of part of the procedure established by the Code and reject the remainder, for the law of the land binds all departments of the state and all litigants alike. If the state as a suitor may ignore part of its own procedure it may ignore it all and seize any realty to which it had title at any time either by administrative action or by the declaration of martial law, suspending civil process.

For these reasons, I dissent from the conclusion reached by Mr. Justice BENNETT respecting the question of trial and its prevention of a voluntary nonsuit and from the statement of Mr. Justice HARRIS that the state is bound only in the main by the rules of procedure and that an express statute is required to support a judgment or decree against the state.

The state, like any other litigant, ought to be compelled to try its cause on the merits without unreasonable delay and not be allowed to split its cause of suit, urging part and holding back the rest as a menace to the defendant.

MR. JUSTICE BENSON concurs in this dissent.

Argued June 17, remanded with directions July 1, rehearing denied July 29, 1919.

SALING v. FIRST NAT. BANK OF TILLAMOOK.*

(182 Pac. 140.)

Attachment—Notice to Attaching Creditor—Innocent Purchaser.

1. Where purchaser informed bank, from whom he had borrowed the money with which to make first payment that he had given up the deal and turned the property back to vendor, bank, attaching property two weeks after vendor had retaken possession, was not in the position of an innocent purchaser without notice, having information sufficient to place it upon inquiry.

Attachment—Adverse Claims—Notice.

2. An attaching claimant takes subject to any adverse claims of which he has knowledge or sufficient notice to put him upon inquiry, notwithstanding Section 301, L. O. L.

Attachment—Adverse Claim—Collusion—Pleading.

3. In action by father to determine adverse claim to father's real estate by son's creditor under an attachment levied upon the property which father had conveyed to son and son had reconveyed to father, allegations of affirmative defense held sufficient to charge collusion between father and son.

Attachment—Collusion—Father and Son.

4. Where father fraudulently, and acting in collusion with son, conveyed property to son, to enable son to obtain credit, and son secretly reconveyed property to father, but with father's knowledge, held himself out as owner, and father, knowing that son was unable to pay debts secretly, and with intent to defraud son's creditors, filed deed purporting to have been executed by son, father will not be given relief against son's creditors, who attached property subsequent to reconveyance, in equitable action to determine such adverse claim.

Equity—Equitable Principles.

5. In suit in equity, equitable rules and principles have full force.

Equity—Maxim—Clean Hands.

6. Plaintiff, in equity suit, must come into court with clean hands.

Equity—Maxim.

7. He who seeks equity must do equity.

From Tillamook: **GEORGE R. BAGLEY**, Judge.

*On right of creditors to attack attachment for fraud and collusion, see note in 35 L. B. A. 779.

Department 2.

This is a suit brought by William A. Saling against the First National Bank of Tillamook, Oregon, to determine an adverse claim of the defendant to certain real property under an attachment levied by it upon the property in question, as the property of Charles A. Saling, plaintiff's son. It appears that the plaintiff was originally the unquestioned owner of the property in dispute. About March 9, 1918, he deeded the same to his son, Charles A. Saling. It is claimed by the plaintiff and the proof tended to show that the deed to his son was made in pursuance of an agreement to sell the property to his son for the sum of \$17,000.

At the time of the execution of the deed, the plaintiff entered into an agreement with his son, as follows:

"Provided, that if, on or before six months from date, Chas. A. Saling does not give unto William A. Saling a satisfactory mortgage for property this day deeded to said Chas. A. Saling by said William A. Saling and L. E. Saling, husband and wife, then said deed shall become null and void and said Chas. A. Saling does hereby forfeit all right and title in said property forever."

"In witness whereof I have hereunto set my hand and seal this 9th day of March, 1918.

"(Signed) WILLIAM A. SALING. (Seal)

"CHARLES A. SALING. (Seal)

"Witness:

"HARLEY J. CURL

"R. E. WILSON."

The deed from plaintiff to his son was filed for record on March 18, 1918. Plaintiff now claims the real arrangement with his son was that the property was deeded to the son and placed in his hands, for the purpose of enabling him to obtain a loan from the federal loan board for the sum of \$8,000, out of which said

son was to pay his father \$5,000 of the purchase price of the property. In the meantime the son was to hold the property in trust for his father, until the loan was passed on, and if he failed to get the loan, then he should forfeit all his rights in the property and the first payment made thereon.

After arranging for the purchase of the land from his father, Charles A. Saling went to the defendant bank and borrowed \$1,000 to make the first payment on the land, informing the bank that he had purchased the land and the improvements, and that he could easily make the payments out of the dairy receipts from the farm. He gave his note to the bank for the loan, due in six months, with interest due at the end of three months, and with the provision that in the event of failure to pay the interest the whole sum should become due at the option of the bank. Charles A. Saling never obtained the loan from the government and never paid his father anything on the purchase price, except the first \$1,000 which he obtained from the bank.

About the sixteenth day of July, 1918, Charles A. Saling seems to have given up the deal and turned the property back to his father, by a deed bearing that date. His father immediately took possession of the premises and remained in that possession up to the time of the trial. Charles A. Saling left Tillamook County and went to other parts of the state, whether permanently or temporarily does not very clearly appear. The plaintiff held the deed in his hands, but did not record it until August 15th succeeding. During the interval between the execution of the deed and its recording and about the 31st of July, 1918, the defendant commenced an action against Charles A. Saling on the promissory note executed to it, and, finding

the record title to the land in Charles A. Saling, levied an attachment upon the same.

The plaintiff, after having his deed recorded, commenced this suit to clear the title and determine the adverse claim of the defendant under the attachment proceedings. It appears that prior to the attachment and about the time he turned the property back to his father, Charles A. Saling informed the defendant bank that he had turned the property back, but did not specifically state he had executed a deed. Afterwards, and prior to the attachment, the cashier of the defendant bank was at the place in question and found plaintiff in apparent possession.

The defendant pleaded two defenses. First: That the attachment was levied without any knowledge of the deed from Charles A. Saling to the plaintiff, and, therefore, that it stood in the position of a *bona fide* purchaser in good faith. Second: That there was fraud and collusion between plaintiff and his son to obtain the money borrowed from defendant and to cheat defendant out of the same.

There was a demurrer by the plaintiff, to each of the defenses pleaded by the bank, which was overruled as to the first affirmative defense, and sustained as to the second. Afterwards there was a trial on the issues presented by plaintiff's complaint, and the denials and first affirmative answer, of the defendant. The court found in favor of the plaintiff and entered a decree, determining the attachment lien of the defendant to be invalid, and decreeing the relief prayed for by plaintiff. The defendant appeals from the findings and decree as to the issues tried, and also from the order of the court sustaining the demurrer to defendant's second affirmative defense.

REMANDED WITH DIRECTIONS.

For appellant there was a brief over the name of *Messrs. Talmage, Claussen & Mannix*, with oral arguments by *Mr. C. W. Talmage* and *Mr. Joseph Mannix*.

For respondent there was a brief and an oral argument by *Mr. George P. Winslow*.

BENNETT, J.—1. As to the first affirmative defense offered by the bank, we think the decree must be sustained. It seems to be clearly proven by the evidence that the plaintiff retook possession of the property at least two weeks before defendant's attachment. This, of itself, would seem to be sufficient notice to put the defendant upon inquiry, and to place upon it the burden of diligence to inquire of the plaintiff as to the nature of his possession. In addition to this, it is admitted that about the time Charles A. Saling turned possession over to his father, he informed the defendant, through its proper officers, that he had given up the deal and turned the property back to his father. It is true he did not specifically say he had *deeded* the property back, but we do not think that was necessary under the circumstances, or that the defendant could disregard the information it had, and refrain from making any inquiry from the plaintiff as to the circumstances under which the property was turned back, and still claim to be an innocent purchaser without notice.

2. Section 301, L. O. L., provides as follows:

"From the date of the attachment, until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property
* * attached."

The language of this section might seem broad enough to put an attaching claimant in the place of a *bona fide* purchaser without notice, where the record title is in the name of the attached debtor, without regard to actual notice or knowledge of adverse equitable claims. But it seems well settled in this state that such an attaching claimant, notwithstanding the statute, takes subject to any adverse claims of which he has knowledge or sufficient notice to put him upon inquiry: *Boehreinger v. Creighton*, 10 Or. 42 (23 Pac. 807); *Riddle v. Miller*, 19 Or. 468 (23 Pac. 807); *Dimmick v. Rosenfeld*, 34 Or. 101 (55 Pac. 100); *Flegel v. Koss*, 47 Or. 366 (83 Pac. 847). In *Riddle v. Miller*, 19 Or. 468 (23 Pac. 807), it is said:

“Acts of that character have always been construed as giving to a creditor, under such circumstances, such rights only as he would acquire under a voluntary sale of the property to him by the debtor for a valuable consideration. They operate to cut off the equities of third persons in the property, where the proceeding under them is taken and perfected without any knowledge of such equities. In the latter case, the equities between the parties being equal, the law prevails; but where a creditor resorts to such a proceeding who is informed of the outstanding equity, or of facts sufficient to put him on an inquiry by which he could ascertain the existence of such equity, the lien he secures thereby will be subject to it.”

These authorities seem to be entirely conclusive as to the defendant's first defense, and entirely justify the findings of the court in relation thereto.

We think, however, that the court erred in sustaining the plaintiff's demurrer to the defendant's second affirmative defense, which is as follows:

“That at all times herein the plaintiff, William A. Saling, and C. A. Saling were father and son.

"That on or about the eighth day of March, 1918, said C. A. Saling, son of William Saling, plaintiff herein, came to the bank of defendant and asked for the loan of one thousand dollars; that for the purpose of inducing defendant to make said loan, which defendant would otherwise have refused to make, said C. A. Saling represented that he had purchased his father's dairy farm, the same being the property described in plaintiff's complaint, and that he needed the thousand dollars to pay to his father, William A. Saling, plaintiff herein, as first payment on the same. Said C. A. Saling further represented to defendant, that with the dairy equipment on said ranch, he could easily pay back to defendant the thousand dollars, together with the interest as it became due, and within the time stated in said note, which was to evidence said loan. That upon said representations, defendant loaned said C. A. Saling the sum of one thousand dollars as stated, and took his note therefor, without any security other than as stated herein, said note being the same referred to in the first separate answer and defense.

"Thereafter said C. A. Saling told defendant that he had turned the ranch herein referred to, back to his father William A. Saling, plaintiff herein, and that therefore he would be unable to pay said note out of his milk checks as he had agreed. That thereupon the defendant requested said C. A. Saling to pay what was due on said note, but that he failed, neglected and refused to pay the same. That thereupon defendant requested plaintiff herein, to pay back said One Thousand Dollars or to secure the payment of the same, but that plaintiff refused and still refuses to pay the same or to secure the same in any manner. That at all times herein plaintiff and his son, the said C. A. Saling acted in conspiracy with the fraudulent intent and purpose of cheating and defrauding said defendant. That plaintiff and his said son well knew at the time that said C. A. Saling applied for the loan of one thousand dollars from defendant herein, that said C. A. Saling would not and could not pay said

note when it came due or at any other time and said plaintiff and said C. A. Saling worked this scheme, solely for the purpose of obtaining from defendant said one thousand dollars, without giving any security, so as to cheat and defraud defendant out of said sum. That except for the property and dairy equipment herein mentioned, the said C. A. Saling was insolvent, at all times material herein, and the plaintiff well knew of his son's insolvency, and well knew that when said son received said thousand dollars, that said son did not intend to pay the same back, and plaintiff well knew that his son had no property, except what plaintiff placed in his hands as herein set forth, to secure the payment of said note, and plaintiff well knew that said son would do and intended to do the very thing which he afterwards did, to wit: abscond from Tillamook, Oregon, to parts unknown to defendant and other creditors, for the purpose of evading process.

"That at the time when defendant filed its attachment as aforesaid, said defendant believed that the title to said property was in said C. A. Saling, and the records of Tillamook County, Oregon, where the property is situated, showed said property to be owned by said C. A. Saling; but that since that date of attachment, it has transpired and come to the attention of the defendant, that on the very day and at the very time, that plaintiff deeded said property to C. A. Saling, his son referred to herein, to wit: on or about March 8, 1918, said plaintiff caused his son, C. A. Saling to deed back said property to himself, and at all times herein the said plaintiff, William A. Saling had that deed in his possession and under his control and ready to use at any time that he saw fit. That plaintiff herein well knew that his son C. A. Saling held himself out to the defendant and to the public generally as the owner of said property, and plaintiff placed said property in the name of C. A. Saling in order that he might use the same to get credit with. That plaintiff did not record the deed which he took back as aforesaid at that time or at any other time, but subsequently said plaintiff secretly and fraudu-

lently and for the very purpose of defrauding defendant, and other creditors of C. A. Saling, his son, filed a deed purporting to have been executed by his son, C. A. Saling to himself, conveying said property from C. A. Saling to himself, said deed bearing date the sixteenth day of July, 1918, and plaintiff recorded the same on the fifteenth day of August, 1918, in the Record of Deeds of Tillamook County, Oregon. That said deed was not recorded until long after the date of defendant's attachment against said property, and that plaintiff now brings this suit to withdraw said property from defendant's attachment, and sets out his deed obtained by fraud as aforesaid, and plaintiff seeks equitable relief without in any way making a tender of the thousand dollars, which he secured from defendant by his fraudulent act, and for which he never furnished the least consideration.

"That at the time of the execution of the note herein referred to by said C. A. Saling to defendant herein, the representations made by said C. A. Saling to the defendant herein, were false; that said C. A. Saling knew them to be false and that they were made by said C. A. Saling with the intent to deceive the defendant. That the defendant herein acted upon said false statements in good faith and without knowledge of their falsity; that defendant had no means of ascertaining their falsity, by reasonable diligence and that defendant would not have acted upon them if it knew the truth. That at all times herein, plaintiff and C. A. Saling were father and son and were acting in collusion and conspiracy, with the common purpose and design of cheating and defrauding defendant."

3, 4. These allegations are not very direct and certain as to the collusion and fraud on the part of plaintiff, and as to plaintiff's participation therein; but it seems the following allegations, when taken together, sufficiently fasten a charge of collusion upon him:

"That at all times herein, plaintiff and his son, the said Charles A. Saling, acted in conspiracy with a fraudulent intent and purpose of cheating and de-

frauding the said defendant. * * That plaintiff herein well knew his son, Charles A. Saling held himself out to the defendant, and to the public generally, as the owner of said property, and plaintiff placed said property in the name of C. A. Saling in order that he might use the same to get credit with. * * Subsequently said plaintiff secretly and fraudulently and for the very purpose of defrauding defendant, and other creditors of C. A. Saling, his son, filed a deed purporting to have been executed by his son to himself. * * That at all times herein plaintiff and C. A. Saling were father and son and *were acting in collusion and conspiracy*, with the common purpose and design of cheating and defrauding defendant."

If these allegations were true, we think plaintiff must fail in this suit without regard to what his technical rights may be in regard to the premises.

5-7. This being a suit in equity the equitable rules and principles have full force. One of these well-established rules is, that the plaintiff in an equity suit must come into court with "clean hands." Another is, "He who seeks equity must do equity." If plaintiff had all the time been in collusion with his son for the fraudulent purpose of getting the money in question from the defendant, and turning it over to his father, thereby defrauding the defendant of the same, as alleged in the answer, he certainly is not coming into court with clean hands, and he would not be doing equity unless he first returned the \$1,000 which he had thus fraudulently helped to obtain. In that even his equitable proceeding would fail and he would have to depend upon his remedy in a law action, where he might be able to maintain his technical rights.

The whole transaction is at least suggestive of fraud and unfair practices. It may be that upon a trial it will develop that everything was fair and regular, and

that there was no intentional fraud; but the defendant should have a right to establish the fraudulent acts of Charles A. Saling and the collusion therein of the plaintiff, if it can do so by competent evidence.

The case is therefore remanded in order that the demurrer may be overruled and the defendant have an opportunity to present any evidence it has as to the defense of fraud and collusion.

REMANDED WITH DIRECTIONS. REHEARING DENIED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Submitted on briefs June 18, affirmed July 29, 1919.

NEWMAN v. MULTNOMAH FUEL CO.

(183 Pac. 1.)

Frauds, Statute of—Sale of Goods—Acceptance of Part.

1. Where the oral buyer of 2,500 cords of wood received and accepted at least 150 cords, the case came within the exception to the statute of frauds (Section 808, subdivision 5, L. O. L.), providing that an agreement for the sale of personalty at a price not less than \$50 must be in writing, unless the buyer accepted and received some part of the property.

Sales—Action for Breach—Damages—Evidence.

2. In an action for breach of a contract to purchase and pay for cordwood cut by plaintiff, plaintiff's testimony as to the cost of the stumpage and of the cutting and hauling held to afford a basis for the computation of damages.

[As to acceptance in part of goods, see note in 96 Am. St. Rep. 220.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

In Banc.

The plaintiff alleges that the defendant is an Oregon corporation; that about July 1, 1915, he entered into a parol agreement with it by which he was to sell and

the defendant was to purchase not less than 2,500 cords of wood by March 1, 1916; and that said wood was to be delivered as ordered, at the contract price of \$3.50 per cord for Number 1, and \$3.00 per cord for Number 2 wood, f. o. b. Portland, payment to be made within ten days after receipt and measurement by the defendant. The complaint recites that pursuant to said contract the plaintiff bought from the defendant one team of horses at the price of \$500 and agreed that the amount of the purchase should be taken out of the proceeds of the sale of 500 cords of wood, and that this subsequent agreement for the payment of the purchase price of the team was reduced to writing on July 6, 1915.

The plaintiff says that pursuant to the verbal agreement of July 1, 1915, he entered into a contract with other parties, for stumpage, cutting and hauling the wood, and purchased materials necessary to carry out the agreement; that he has at all times been ready, able and willing to carry out his part of the contract; that prior to November, 1915, the defendant kept the contract and purchased about 650 cords, but at that time the plaintiff, at the defendant's request, cut the amount of his shipments about one half and in December, 1915, the defendant requested him to stop all shipments for the time being, but continued to affirm its agreement and advised plaintiff that it would soon use "at least one carload of wood per day, and could use all the wood it had contracted for." It is further averred that the plaintiff continued to cut the wood and endeavored to comply with the contract, and that on February 28, 1916, the defendant informed him that it would not take any more wood and ever since has refused and still refuses to carry out its agree-

ment, by reason whereof the plaintiff has been damaged in the sum of \$1,500.

After denying all the material allegations of the amended complaint, for a further and separate answer the defendant alleges that on July 6, 1915, it entered into a written contract with the plaintiff, which is pleaded *in haec verba*, and further avers:

"Said written contract constitutes the only contract for the purchase of any definite quantity of wood by defendant from plaintiff and said contract was subsequently fully executed and discharged by both parties thereto.

"That the purchase of said team of horses from defendant and the purchase of five hundred cords of wood by defendant from plaintiff, as set forth in said written contract and subsequently carried out, formed no part of and had no connection whatsoever with any other contract or understanding which this defendant had with the plaintiff for the purchase of wood or otherwise."

The defendant also alleges that after the completion of the written contract there was an understanding that the plaintiff should continue to furnish wood as it might be needed, at such times and in such amounts as defendant might designate, for which the defendant was to pay \$3.50 per cord, and that "no wood was to be delivered unless ordered by the defendant"; that "said arrangement contemplated and covered only such quantities of wood as the defendant might be able to handle in its business from time to time, but that no definite or specific number of cords nor any specific quantity of wood was designated or contracted to be so delivered." It is further averred that under such arrangement in and between the months of July, 1915, and February, 1916, the defendant repeatedly urged plaintiff to deliver carloads of wood as they

were required by the defendant in its business; that the plaintiff failed to make such deliveries, alleging shortage of cars and inadequate transportation facilities, and that the defendant was thereby embarrassed in its business, resulting in its damage.

The reply specifically denied all the new matter in the answer.

When the plaintiff rested his case the defendant filed the following motion:

"We desire at this time, your Honor, in order to save the record, to move the court for a nonsuit in this case, for the reason that the evidence of the plaintiff is not sufficient to sustain the allegations of the complaint."

The court sustained the motion, but after further argument reversed its ruling.

When the testimony was all taken the court instructed the jury in a charge remarkable for its brevity. Neither counsel requested any instructions or took any exceptions. The jury found for the plaintiff for \$200. No motion was filed for a directed verdict or to set aside the verdict rendered. From a judgment in favor of the plaintiff the defendant appeals, claiming that the trial court erred in denying its motion for a nonsuit, for the reason that there was no legal evidence to support the judgment; that the alleged oral agreement was merged in the written contract; that there is no damage shown; that exclusive of the written contract, the parol agreement was void, because it was an oral contract for the sale of personal property at a price exceeding \$50, and also because of uncertainty; that the plaintiff's alleged cause of action was "one for the breach of a contract arising out of the sale and delivery of cordwood, and not one arising out of the manufacture of any article to

be delivered"; and that there is no evidence of the market value of the wood at the time and place of delivery.

AFFIRMED.

For appellant there was a brief submitted over the name of *Messrs. Gebhardt & Hendrickson*.

For respondent there was a brief prepared and submitted by *Mr. Conrad P. Olson* and *Mr. James R. Bain*.

JOHNS, J.—In the absence of any requested instructions or exceptions to those which were given, a motion for a directed verdict or to set aside the judgment, the overruling of the motion for a nonsuit is the only question before this court. While that motion does not point out or specify the grounds upon which it should be sustained, it appears that it was argued before the court and after argument the court made this ruling:

"I don't see how you can get away from the law, Mr. Olson. It seems to me this amounts to a sale of personal property to the value of more than fifty dollars, and if so, the agreement should be in writing."

After further argument the court ruled:

"Well, this evidence went in without objection. On cross-examination you inquired into the cost of cutting the cordwood, and so forth. I think I will change my ruling on that. The motion for a judgment of nonsuit is denied and an exception is allowed."

It is apparent from this that in any event the question of the statute of frauds was argued to and considered by the court.

Assuming that the remaining questions now urged by the defendant were embraced within the motion for a nonsuit and argued before the trial court and are

now legally before this court, we think the judgment should be affirmed.

1. It appears that the plaintiff did not have any cordwood and was not engaged in the wood business at the time of the alleged parol agreement; that the contracted wood was then in the form of standing timber, only a portion of which was owned by the plaintiff, and that he had contracted with the owners of timber for the remainder of the 2,500 cords. It is also shown that under the terms of the alleged contract the wood was to be delivered f. o. b. Portland at the defendant's place of business. To comply with his contract it was necessary for the plaintiff to fell the timber, cut it into cordwood and haul it to the railroad for shipment, to purchase tools, to employ men for the cutting and to procure men, wagons and teams for the hauling. This was done, and the plaintiff was actually engaged in complying with his alleged oral contract. The evidence shows that the plaintiff cut the wood expressly for the defendant and not for the public market, and that in fact his contract was one to make cordwood out of standing timber and to deliver it by the labor of man and team. The jury found for the plaintiff, and for such reason we must assume that there was an oral contract between the plaintiff and the defendant. The alleged written contract was for 500 cords of wood, but it is undisputed that the plaintiff delivered and the defendant accepted 650 cords of wood. It must follow that at least 150 cords of wood were delivered and accepted under the oral contract. Section 808, subdivision 5, L. O. L., known as the statute of frauds, specifying what contracts shall be void says:

“An agreement for the sale of personal property at a price not less than \$50, unless the buyer accept and receive some part of such personal property. * * ”

By the undisputed facts after verdict the defendant did accept and receive at least 150 cords of wood on the oral contract and it did "accept and receive some part of such personal property," and for such reason the defendant comes within the exception.

2. The defendant also contends that there was no legal testimony on the measure of damages. The plaintiff testified as to the cost of the stumpage and of the cutting and hauling, and the railroad charges upon each cord of wood; that he was to receive \$3.50 per cord for Number 1, and \$3 per cord for Number 2, or doty wood, and that as to the latter there was no stumpage charge. From this evidence, the amount of plaintiff's damage was a question of mathematics only.

While the defendant contends that the only contract which it ever had with the plaintiff was in writing, and was for only 500 cords of wood, the plaintiff alleges that there was a parol agreement for the sale and purchase of 2,500 cords, to be delivered on or before March 1, 1916, and that such parol agreement was separate and distinct from and was not embraced within the terms of the written contract; in other words, that there were two separate and distinct contracts, one in writing for 500 cords of wood, from the proceeds of which the plaintiff was to pay \$500 as the purchase price of the team; and the other in parol, for 2,500 cords. That was a question of fact and the jury found for the plaintiff. While reasonable men might and would differ as to the verdict which should be rendered, the fact remains that there is sufficient evidence to sustain the verdict returned by the jury. The judgment is affirmed.

AFFIRMED.

Submitted on brief of appellant and affirmed July 29, 1919.

SPEXARTH v. SHERMAN.

(183 Pac. 23.)

Taxation—Payment—Time—Constitutionality of Statutes.

1. It was within the power of the legislature to pass Section 3682, L. O. L., as amended by Laws of 1913, page 334, Section 20, requiring taxpayers to pay their taxes on April 1st, but permitting them to then pay one half of the sum due and allow the remainder to run until September 1st, by paying a sum equivalent to one per cent a month on the unpaid balance.

Appeal and Error—Disposal of Cause—Statutory Amendments.

2. Where an action was brought in 1914 to restrain a county treasurer from collecting penalties under Section 3682, L. O. L., as amended by Laws of 1913, page 334, Section 20, and a demurrer to the complaint was sustained, and an appeal was taken to the Supreme Court, and pending the appeal the act of 1913 was amended by Laws of 1915, page 184, Section 1, so as to eliminate the penalties, and Laws of 1915, page 298, an act of general amnesty and forgiveness as to penalties incurred, was enacted, the demurrer will be sustained by the Supreme Court, but the clerk of the Circuit Court, where the taxes without the penalties were tendered, will be ordered to pay to the county treasurer the amount so tendered and paid into court, and the proper authorities will be ordered to accept the same in full payment of taxes.

From Clatsop: JAMES A. EAKIN, Judge.

In Banc.

This was a suit to restrain the treasurer of Clatsop County from collecting certain penalties upon taxes not paid on April 1, 1914, and arises out of the following facts:

Section 3682, L. O. L., as amended by Section 20, Chapter 184, Laws of 1913, reads as follows:

“Sec. 3682. When Taxes Payable. Taxes legally levied and charged in any year shall be paid before the 1st day of April following. If the taxes against any particular parcel of real property, or the taxes on personal property charged against any individual, firm, corporation or association, are not paid before said 1st day of April, penalties shall be charged on such taxes and added to and collected with the same, as follows:

"1. A penalty of one per cent on all taxes paid on or after the said 1st day of April and before the 1st day of May following.

"2. A penalty of two per cent on all taxes paid on or after the said 1st day of May and before the 1st day of June following.

"3. A penalty of three per cent on all taxes paid on or after the said 1st day of June and before the 1st day of July following.

"4. A penalty of four per cent on all taxes paid on or after the said 1st day of July and before the 1st day of August following.

"5. A penalty of five per cent on all taxes paid on or after the said 1st day of August and before the 1st day of September following."

The plaintiff was assessed for the year 1913 in the sum of \$1,945.04, due on April 1, 1914, and on said date elected to pay one half of said sum, leaving the sum of \$972.52 unpaid. On August 12, 1914, he tendered to the defendant, as tax collector, the remaining half and demanded a receipt in full of his taxes for 1913, which defendant refused to give, claiming that plaintiff should pay an additional 5 per cent as penalty. The plaintiff brought this suit to compel the defendant to accept the sum tendered and issue the receipt.

A demurrer to the complaint was sustained and plaintiff, refusing to plead further, the suit was dismissed, from which order he appeals. **AFFIRMED.**

For appellant there was a brief submitted over the name of *Mr. Clarence J. Curtis*.

For respondent there was no appearance whatever.

McBRIDE, C. J.—1. The law, although harsh, is, in our judgment, clear. Taxpayers were required to pay their taxes on April 1st, but were permitted to pay

one half the sum due and allow the remainder to run until September 1st, by paying a sum equivalent to 1 per cent a month on the unpaid balance. If not then paid the tax became delinquent and still further penalties were added. The purpose of the large penalty, or interest, required to be paid on that moiety of the taxes not paid on April 1st, was evidently to induce taxpayers to pay up promptly, and it was entirely within the power of legislature to pass such an act. Therefore, on August 12, 1914, plaintiff should have tendered to defendant \$48.62, in addition to the principal sum due, and the demurrer was properly sustained.

2. The act of 1913, *supra*, was amended by Section 1, Chapter 156, Gen. Laws of 1915, so as to eliminate the objectionable features of the previous act, and at the same session Chapter 223 was enacted, which was an act of general amnesty and forgiveness as to all penalties incurred under the act of 1913, *supra*; so that in any event, the amount brought into court at the commencement of this action would satisfy the demands of the last statute on the subject.

Owing to the death of counsel for appellant and the removal from the state of the counsel for respondent, this case has not been brought up for hearing at an earlier date.

The demurrer will be sustained and the clerk of the Circuit Court will pay over to the county treasurer the amount tendered and paid into court, and the proper authorities will receipt to him and to plaintiff for the tax of 1913, and the same will be marked paid on the tax-roll. Neither party will recover costs.

AFFIRMED.

Argued July 3, affirmed July 29, 1919.

SMITH v. HEADLEE.*

(183 Pac. 20.)

Mortgages—Absolute Deed—Intent.

1. A deed absolute in form, or any other conveyance, must be construed to be a mortgage subject to redemption, where it is made manifest from a consideration of all surrounding facts and circumstances that the parties thereto intended the conveyance to operate only by way of security.

[As to absolute deed as mortgage, see note in 129 Am. St. Rep. 1137.]

Mortgages—Absolute Deed—Burden of Proof.

2. The burden of proof rests upon one claiming that a deed absolute in form is a mortgage to show the real character of the transaction; the presumption existing that a deed absolute on its face is what it purports to be.

Mortgages—Absolute Deed—Character of Instrument—Security.

3. A deed absolute on its face is a mortgage if a pre-existing debt in relation to which it was given was not extinguished, or if a new debt was intended to be created and the conveyance was given as security therefor.

Mortgages—Absolute Deed—Evidence.

4. In action to have a deed absolute in form declared a mortgage, evidence held to show that the deed was executed only as security for a pre-existing debt and for advances to be made.

From Columbia: JAMES A. EAKIN, Judge.

Department 2.

Plaintiff instituted this suit to have a deed, executed by plaintiff to defendant J. R. Headlee, which is absolute on its face, declared to be a mortgage. A decree was rendered in favor of plaintiff from which defendant appeals.

The facts in relation to the transaction are substantially as follows: On the twenty-sixth day of December, 1912, the plaintiff John J. Smith gave to defendant J. R. Headlee a note for the sum of \$100, loaned to plaintiff by Headlee, and executed a mortgage on

*On parol evidence that a written instrument which on its face imports a complete transfer of a legal or equitable estate or interest in property was intended to operate as a mortgage, see comprehensive note in L. R. A. 1916B, 18.

REPORTER.

sixty acres of land described in the complaint to secure the same. Smith was then in poor health, needing money to pay his expenses in the hospital, where he went and remained for a time, after which he returned to his home on the land. The mortgage was never recorded. About February 25, 1913, the plaintiff was compelled to return to the hospital and desired an additional loan from J. R. Headlee with which to meet his expenses. On that date he executed to Mr. Headlee a warranty deed to the premises to secure the payment of \$100 and interest mentioned in the mortgage, and also as security for any sums of money the defendant J. R. Headlee might expend for the benefit of plaintiff in paying his hospital fees, for medical services, and taxes on the land. Mr. Headlee at that time agreed to pay his expenses for a period not exceeding one year. The note and mortgage were not surrendered or canceled, but were retained by J. R. Headlee. The plaintiff testifies that at the time of the execution of the deed, it was understood and agreed that upon the repayment by the plaintiff of the sum of \$100 mentioned in the mortgage, and the payment of the sums of money, defendant J. R. Headlee might pay for the benefit of the plaintiff to Mrs. Landfare for hospital expenses and to Dr. Sproat, together with payment for medicine for the plaintiff, and any taxes on the real property paid by Headlee; that the defendant J. R. Headlee and his wife Cora Headlee would reconvey the real estate described in the complaint. At the time of the execution of the deed, Mr. Smith sent for Mr. Headlee and they went to the office of the notary public; that he told Mr. Headlee that he needed more money, and they talked about making him out better security. Smith said: "Well, if you have to have it, why I have to give it." The notary public made out the deed, and Mr. Headlee was to pay

the expenses to Mrs. Landfare and the doctor. Smith states:

"A. Well, I demanded a bond for a deed security to show that I could redeem the place after I would get the money. He says, 'Any time that you get the money and principal, why you can have your place, I don't want it.' * * *

"Q. Any time you get the money and interest, the principal and interest, he would deed the place back to you, did he say that?

"A. Yes, that is what he did."

It appears that the plaintiff is illiterate and signed the deed by making his mark; that Headlee was to keep up the taxes and insurance on the place; that Mr. Headlee did not want to give a bond for a deed as he did not want any expense, in case Smith failed to make payment; that Mr. Headlee said to Smith:

"Any time you bring me the money, principal and interest, I will turn these papers over to you." "Deed me the land back. Deed it back again just the way it was."

Mr. N. F. Norem, the notary public, who drew the deed stated in substance that after the deed was signed, they wanted some understanding besides the deed with regard to the land, or with regard to the payment of the doctor, and also Mrs. Landfare, just exactly the kind of contract he did not remember, but it was something in regard to the land, and he did not feel as though he wanted to make up the contract, and he referred them to an attorney. He further stated:

"Well, it seems that Mr. Headlee, in case that Mr. Smith was to die or would not be able to redeem his land, why, he didn't want any trouble with any of Mr. Smith's relations, that he wanted absolutely complete, he wanted to have the complete ownership of the property, of the land, without having to foreclose a mortgage or something of that kind, or any trouble."

Mr. J. J. Johnson, the attorney with whom the parties consulted, testified to the effect that they brought the deed to him; that at the time nothing was reduced to writing between Headlee and Smith. As he remembered, Mr. Headlee stated that Mr. Smith already owed him some money in the neighborhood of \$100; they anticipated that Mr. Smith had to have treatment by the doctor and go to the hospital. Smith had no means to pay this expense, and he was to transfer this property to Headlee. Headlee was to take care of this expense for one year, after which time it was optional with Headlee as to what he might pay. Then Smith wanted some kind of a contract that he could buy this property back if he got well and wanted the property, and "Mr. Headlee wanted to know what effect that would have upon the title that he would get," He states:

"I explained to both of them that if they took the deed simply as security for whatever money Mr. Headlee might advance, that it would be a mortgage and that he might as well increase the mortgage he already had, there was no need of taking a deed which would be no more or less than a mortgage and if he gave a contract to purchase the land at a reasonable figure, the probability would be that either Mr. Smith in the future or some of his heirs, in case it became their part, might try to construe that contract into making the deed a mortgage, so in any event, he would have taken a risk if he took that contract."

Mr. Headlee said: "If there was to be any question of a mortgage in this deal that he wasn't going to have anything more to do with the transaction"; that he explained to them that it must be an absolute conveyance; that he explained to Mr. Smith that if he delivered the deed to Mr. Headlee under the agreement that he was to convey him this property, and Headlee

obligates himself to pay whatever expenses there may be for a year, "*and relieve you of this indebtedness that you already owe him,*" that the land would be Headlee's.

Dr. James Sproat testified in corroboration of plaintiff as to what occurred at the notary public's office; that he was at the attorney's office only a portion of the time while the parties were there. **AFFIRMED.**

For appellants there was a brief over the names of *Messrs. Harris & Gore* and *Mr. William M. Cake*, with oral arguments by *Mr. W. A. Harris* and *Mr. Cake*.

For respondent there was a brief over the names of *Messrs. Needham & Needham* and *Mr. A. W. Mueller*, with oral arguments by *Mr. Daniel Needham* and *Mr. Mueller*.

BEAN, J.—A careful reading of the testimony, fragments of which we have referred to, shows that the deed executed by the plaintiff to defendant J. R. Headlee was for the purpose of securing the payment of \$100 loaned by Headlee to Smith with interest thereon, and any further sums of money paid by defendant J. R. Headlee as expenses for plaintiff, together with any taxes and insurance premiums on the real property paid by Headlee, and that it was understood and agreed between the parties that when the plaintiff paid defendant Headlee such sums with interest, he should "have his land back," that is, Headlee and his wife would reconvey the land to plaintiff, and that the deed although absolute on its face was in effect a mortgage.

It appears from the record that at the time of the execution of the deed, the plaintiff desired and was

practically compelled to have some financial assistance in order for him to receive medical attention and proper care, and that he applied to the defendant Headlee who was his friend and neighbor for help. He was perfectly willing to secure the payment of all that he then owed Headlee as well as all future advances, Headlee agreed to make and should make. It seems that it was agreeable to both that when Smith should repay Headlee in full that Smith should have his land back. In case he did not recover his health so as to be about again, and failed to make such payment, Headlee did not want to have the deed in such a condition that he would have to foreclose, or so that any of Smith's heirs could make trouble for him. At no time did Headlee seem unwilling to agree to reconvey the land if Smith paid him in full. On this point, he does not dispute the plaintiff as to the substance of what was said in regard thereto. Indeed when the matter was broached by plaintiff's attorneys, defendant Headlee offered to reconvey the land to plaintiff upon the payment of \$850, which was more than the plaintiff was willing to pay, and more than the trial court found to be due from plaintiff to defendant Headlee. It is fair to conclude that defendant made this offer for the purpose of showing that he was ready to carry out the agreement made at the time of the execution of the deed.

The trial court carefully ascertained the amount due from plaintiff to Headlee, and fixed the same as \$575.04. No error is assigned in this respect.

The story is an old one. Headlee, while he was satisfied to have Smith rest assured that the land would be deeded back to him if he made payment, was not willing to make such agreement in writing, and in case Smith failed to pay, then, he desired to have the

deed an absolute one. He was advised by an attorney as to what the law was in regard to a deed given as security, but he did not seem willing to follow such advice. He undertook like many others to have the deed absolute, when in reality it was given as security, and for no other purpose, and was in effect a mortgage.

It is a maxim of equity that: "Once a mortgage always a mortgage." By this is meant that the character of a transaction involving the conveyance of property is fixed at its inception, and if at that time the conveyance is intended to operate by way of security and as a mortgage, a mortgage it must remain with all the incidents thereof despite express stipulations to the contrary in the instrument of conveyance looking to the abrogation of the mortgagor's equity of redemption. A court of equity never deviates from this doctrine. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will submit to ruinous conditions, waiving the equity of redemption allowed him on breach of his obligation, in the expectation and hope of repaying the loan at the stipulated time and thus preventing forfeiture. It is axiomatic that a conveyance cannot be a mortgage unless given to secure the performance of an obligation. Conversely, if the conveyance is intended to secure an obligation, it will be construed in equity as a mortgage and as nothing else. The form or letter of an instrument of conveyance is not conclusive of its character, but its purpose is the decisive factor; and if that be security, then the instrument, irrespective of its form, must be construed to be a mortgage. The question is one of intention to be decided from a consideration of the whole transaction and not from any particular feature of it. Therefore,

the characterization of the transaction by the parties may be fairly disregarded: 19 R. C. L., p. 244, par. 7.

1. From the controlling principle that a conveyance is a mortgage irrespective of its form, if designed to secure the performance of an obligation, it results that a deed, though absolute in form and unqualified by any accompanying agreement for a reconveyance of the property or a defeasance, must be construed to be a mortgage subject to redemption where it is made manifest from a consideration of all surrounding facts and circumstances that the parties thereto intended the conveyance to operate by way of security and in no other mode. This rule is frequently enunciated and applied: 19 R. C. L., p. 261, par. 29.

2. There can be no question but that the burden of proof rests upon one whose claim is founded upon the theory that the real character of the transaction is different from that which is imported by the language of the deed of conveyance. The presumption exists that a deed absolute on its face is what it purports to be: *Harmon v. Grants Pass Banking & Trust Co.*, 60 Or. 69 (118 Pac. 188); *Beall v. Beall*, 67 Or. 33 (128 Pac. 835, 135 Pac. 185); *Parrish v. Parrish*, 33 Or. 486 (54 Pac. 352). Plaintiff has borne that burden by proving the allegations of his complaint.

3. In order to determine whether a deed absolute on its face is in effect a mortgage, the test is, was a debt created, or was a pre-existing debt continued, and was the instrument designed as security. If the pre-existing debt was not extinguished, or if a new debt was intended to be created and the conveyance was given as security therefor, then it should be declared to be a mortgage: *Bickel v. Wessinger*, 58 Or. 98 (113 Pac. 34); *Caro v. Wollenberg*, 68 Or. 420, 427 (136 Pac. 866); *Grover v. Hawthorne Estate*, 62 Or. 77 (114

Pac. 472, 121 Pac. 808); *Reilly v. Cullen*, 159 Mo. 322 (60 S. W. 126).

4. In the case at bar, there was a pre-existing debt owing from plaintiff to defendant J. R. Headlee of \$100, which was not extinguished at the time of the execution of the deed. Headlee retained the note given as evidence thereof, and also kept the mortgage. There was also a new obligation, indefinite in amount, from Headlee to Smith, created in making the arrangements for the payment of medical services and hospital expenses, etc. The whole transaction plainly shows that the deed was given as security to Mr. Headlee for the several amounts. The testimony fully sustains the findings of the trial court. We fully concur in such findings.

Finding no error in the record, the decree of the lower court is affirmed.

AFFIRMED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued June 25, affirmed July 22, rehearing denied September 9, 1919.

FLETCHER v. FISCHER.

(182 Pac. 822.)

Factors—Brokers—Status of Sales Agent.

1. Sales agent for cereal manufacturers, as to a stock of goods kept in a particular city, from which sales were made, held a factor, while as to shipments made from another point where the manufacturer's mill was located he was a broker, having been in both classes of transactions an agent acting on a *del credere* commission, since he guaranteed all accounts.

[As to definition and distinctive features of factors, see note in 58 Am. Dec. 158.]

Brokers—Sale on Del Credere Commission—Status as Debtor.

2. The weight of authority is that a broker selling goods on a *del credere* commission stands in the relation of an original debtor to his principal.

Contracts—Vague Language—Construction by Parties—Evidence.

3. In an action for breach of contract, the court properly admitted evidence of its practical construction by the parties as indicated by their conduct to explain vague and uncertain language.

Principal and Agent—Default of Agent—Failure to Remit—Reasonable Time and Demand.

4. Where the contract of a sales agent for cereal manufacturers was silent as to when remittances should be made by him, he could not be put in default by a failure to remit until after a reasonable time had elapsed and demand made by the manufacturers.

Pleading—Reply—Departure.

5. In an action by the sales agent of cereal manufacturers for breach of contract, plaintiff's reply to defendants' affirmative answer, reciting acts which disclosed a course of conduct by defendants indicating a practical interpretation of the contract, and contending it was too late for them to repudiate such interpretation, *held* not to admit plaintiff's own prior default and to constitute a departure from the cause of action set forth in the complaint.

Principal and Agent—Sales Agent—Damages—Evidence.

6. In an action against cereal manufacturers for breach of their contract to employ plaintiff exclusively as selling agent for five years, evidence of plaintiff's business as a jobber in groceries, its extent, expenses, increase and the increase of commissions on the particular cereal line, *held* competent and admissible on the issue of plaintiff's damages and permissible recovery.

Principal and Agent—Sales Agent—Breach of Contract.

7. In an action against cereal manufacturers by their sales agent for breach of their contract to employ him exclusively for five years, evidence *held* sufficient to support verdict for plaintiff for \$17,000 damages, less \$5,500 already in his hands.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

This is an action for the recovery of damages for the breach of a contract. The complaint recites that on January 2, 1914, plaintiff and defendants entered into a contract whereby plaintiff became the exclusive selling agent for Oregon and Washington of cereal products manufactured by defendants at their mill in Silverton, for a term of five years. A copy of the contract is attached to the complaint as exhibit "A." This contract was modified in July, 1914, by a supplemental writing, also made a part of the complaint as

exhibit "B." By the terms of this contract, as modified, it was agreed that until January 1, 1915, plaintiff should receive a total commission of 33 $\frac{1}{3}$ per cent, and after that date his total commission should be 30 per cent. In the written instrument the defendants, under the firm name, "Fischer's Flouring Mills," are the party of the first part, and plaintiff is the party of the second part. Among others, the contract contained the following clauses:

"VII. The party of the first part is to carry a complete stock of all their cereals in Portland at all times upon the order of the party of the second part.

"VIII. Deliveries or shipments to the retail trade are to be made from Portland or Silverton, Oregon, whichever is the more expeditious. * *

"XI. That the party of the second part is to guarantee the payment of all accounts, and any bills which are uncollectable are to be charged to the commission account of the party of the second part. Copies of all statements of accounts mailed each month are to be forwarded to the party of the second part.

"XII. A full account of all commissions earned is to be sent to the party of the second part each month by the party of the first part with a check to cover the same."

It is alleged that on September 1, 1916, defendants violated the terms of the contract by repudiating their obligation thereunder, and refusing to send plaintiff any more cereals; that plaintiff has sent in orders from many customers in Oregon and Washington for more than 130,000 pounds of rolled oats and other cereals mentioned in the agreements, which defendants have failed and refused to fill, and refuse to pay plaintiff any commissions, and expressly disavow any obligations under the contract. The allegations in regard to damages are as follows:

"That at the time when the said defendant, August William Fischer, as manager and trustee of the said estate, and this plaintiff executed the said contract, a copy of which is hereto attached and marked Exhibit 'A,' the said defendant well and fully knew that the plaintiff had no business in, nor line of customers for cereals, and would be required to build up a business, trade and goodwill in the same, and that when thus built up and acquired the same would be valuable not only to the defendants but also to the plaintiff; and during the first eight months of the said contract the plaintiff sold not less than about \$19,200 worth of cereals; that during the next twelve months, from September 1st, 1914, to September 1st, 1915, of the said contract the plaintiff sold not less than \$45,000 worth of cereals; during the period of twelve months immediately preceding the breach of the said contract by the defendants, to wit: September 1st, 1915, to September 1st, 1916, the plaintiff sold not less than about \$67,250 worth of cereals on which the plaintiff's gross commissions are \$20,175, and after the plaintiff has deducted therefrom all sums of money allowed by him to the trade as discount and freight, salesmen's salaries and expenses, office expenses, incidentals and all other expenses, etc., he has remaining in his hands as clear net profit \$5,196, by which the plaintiff has ascertained that it costs him to carry on and transact his aforesaid business a total expense of not more than 70 per cent of his total commissions, leaving in his hands as a net balance and clear profit to this plaintiff 30 per cent of his total commissions; that the said business up to the present time has been constantly growing larger and larger, thereby gradually decreasing the *pro rata* expense of handling the increased volume of business; and, had the defendants not violated and repudiated the said agreement, the said business would continue to grow much larger, and the plaintiff would have continued to receive 30 per cent commission upon the total sale of cereals, and estimates that not less than 31 per cent of the total com-

missions would have been net profit to this plaintiff during the remaining period of the said contract.

“That by reason of the facts aforesaid the plaintiff has established upon the market the cereal products manufactured by the defendants in the said Corvallis and Fischer Flouring Mills, and has established for the same in the northwest a good name and reputation, and has established for himself a good reputation and goodwill in the cereal market in the aforesaid territory, which is of great value to the plaintiff, and large numbers of customers are purchasing the said cereals manufactured by the defendants by reason of the said efforts made by the plaintiff to establish the same upon the market; that on account of the said repudiation of the said contracts and agreements, and by reason of the conduct of the said defendant August William Fischer, as manager and trustee of said estate, and by reason of all the facts herein enumerated, and especially in paragraph XV of this complaint, and by reason of the fact that plaintiff cannot fill his orders for cereals now on hand and supply his customers, and by reason of the fact that defendants are now notifying the trade that they have severed relations with the plaintiff and that he is no longer able to secure their products, the plaintiff's standing and goodwill, reputation and good name, especially in the trade and among the customers and purchasers of cereals throughout the northwest, and especially in the states of Oregon and Washington, and the good name and reputation which the plaintiff built up and procured for the said cereals has been rendered useless, and has been lost to the plaintiff.

“That the plaintiff estimates and believes that during the months of September, October, November and December, 1916, the plaintiff would and could sell not less than \$24,000 worth of cereals, upon which he would have received a total commission of not less than \$7,200 out of which he would have had remaining in his hands as clear net profit over and above all expenses a sum of not less than \$2,232; and plaintiff estimates and believes that during the fourth year of his

said contract the plaintiff could and would have sold not less than \$71,400 worth of cereals upon which he would have received a total commission of \$21,420, and after the plaintiff would have paid out all of the expenses incident to the sale of that amount of cereals, the plaintiff estimates he would have had remaining in his hands the sum of \$6,640.20 over and above all of his expenses; and the plaintiff estimates and believes that during the fifth year, being the last year of the said contract, the plaintiff could and would have sold not less than \$74,970 worth of cereals, upon which he would have received a total commission of \$22,491, and after paying all of the expenses incident to the sale of the said cereals he estimates he would have had remaining in his hands over and above all expenses a sum of money not less than \$6,972.20, and that, therefore, based upon the above estimates of business, the plaintiff would have received during the balance of the term of his contract not less than \$15,844.41 net commissions and profits over and above all expenses and liabilities; that the said contracts, copies of which are hereto attached and marked exhibits 'A' and 'B,' were worth to this plaintiff not less than \$15,844.41 for the balance of the term from September 1, 1916, to the first day of January, 1919; and by reason of the said acts of the said defendants, and especially of the said August William Fischer as manager and executor of the said estate, the value of the said contracts has been destroyed and lost to the plaintiff."

It is further asserted that because there are but few cereal mills in the territory, and that as these have their own cereal departments, plaintiff will not be able to make a similar contract elsewhere. It is also alleged that plaintiff was obliged to go into the open market and purchase supplies to fill certain of the orders which defendants refused to supply and that to do so cost him \$250 more than it would have done if defendants had complied with the terms of the contract, and that he will be compelled to do the same

thing with other orders, to his damage in the sum of \$2,500. These allegations are followed by this:

“That by reason of past transactions had between the plaintiff and the said August William Fischer as manager and trustee of the said estate, the plaintiff would be indebted to the defendant August William Fischer as manager and trustee of the said estate in a sum of money amounting to approximately \$5,500 had the defendant not repudiated the said agreements, and the plaintiff is now holding and retaining the said sum of approximately \$5,500 as an offset to the damages incurred by him by reason of the said facts aforementioned, and has notified the said defendant August William Fischer of the aforesaid reason for holding the said sum of money.”

After averring full compliance by plaintiff with the terms of the contract, there is a prayer for judgment in the sum of \$18,594.41 less the aforesaid sum of \$5,500.

The answer admits the execution of the contract as alleged in the complaint, but denies that the defendants have breached the same, denies all of the allegations regarding damages suffered thereby, and denies that plaintiff has fully performed his obligation thereunder. They then plead affirmatively as follows:

“That from the midsummer of the year 1916 up to the twenty-second day of September, 1916, the plaintiff made requisitions for cereals to be shipped to Portland under the clause in the said agreement numbered seven, requiring the defendant August William Fischer to carry a complete stock of all their cereals in Portland at all times upon the order of the plaintiff, and under guise of the said requisitions, being in possession of the said cereals, at Portland, Oregon, the plaintiff sold the said cereals to various purchasers in Oregon and Washington on his own account and billed the said goods to the said purchasers in his own name as the seller, and did not, in many instances,

notify, when said orders were given, the said August William Fischer, or any of the defendants, or the Corvallis Flouring Mills, or the Silvertown Mills, of the names of the said purchasers, or the amounts of the said purchases, or the prices thereof, and, contrary to the said agreement, collected sums of money from the said purchasers upon said sales, and in violation of the said agreement retained the said sums of money in his own hands, and failed, neglected and refused to transmit the same to the defendants, or either of them, and when the defendants discovered these facts the said August William Fischer demanded payment of the said sums of money, and the said plaintiff failed, neglected and refused to pay the said sums of money upon said demand, and has ever since failed, neglected and refused to pay the same; and that upon complaint being made by the plaintiff to the defendant August William Fischer, under the name of the Corvallis Flouring Mills, notified the plaintiff by wire as follows:

“ ‘When you pay your account we will proceed to fill further orders.’ ”

“ ‘But the defendants allege that the plaintiff did not, in response to said wire or otherwise, pay the said account or any part thereof, and never has done so; that about one half of the \$5,500 alleged in the complaint to have been retained by the plaintiff are the proceeds which he received as aforesaid for the cereals sold in the manner aforesaid, and the other one half, or thereabouts, is the balance of the sum due to the defendants by the plaintiff for flour sold by them to the plaintiff.’ ”

“ ‘The defendants allege that they have performed their said contract in every respect, and were at all times ready and willing to perform it until the plaintiff himself violated the said contract in the manner hereinbefore described, and that the alleged breaches of the said contract, alleged in the second amended complaint, by the defendants, are the refusal to fill the said orders under the circumstances hereinbefore alleged in this answer, and not otherwise.’ ”

The reply denies the allegations of the affirmative answer and further alleges:

“That at the times mentioned in the second amended complaint, when the defendants refused to further comply with their contracts with the plaintiff, copies of which said contracts are attached to the second amended complaint, and therein marked exhibit ‘A’ and exhibit ‘B,’ the said defendants based their refusal to comply with the said contracts upon only one ground, and no other, to wit: that the defendants did not care to pay the plaintiff a commission of thirty per cent upon sales of cereals, and said they would not pay the plaintiff thirty per cent; that at all of the times when the said defendants refused to comply with the said contracts, copies of which are attached to the second amended complaint and marked exhibits ‘A’ and ‘B,’ said defendants based their said refusal upon only the ground aforesaid, and no other; and said defendants have never at any time prior to the filing of the answer herein based their said refusal to fill the plaintiff’s orders for cereals and maintain their stocks in Portland upon the ground that the plaintiff had refused to pay to said defendants any money whatsoever; and, therefore, the plaintiff alleges that said defendants are estopped to assert, and ought not be permitted to say that the defendants, or any one of them, refused to fill orders for cereals sent to them by the plaintiff, and refused to do and perform further the contracts, copies of which are attached to the second amended complaint, and therein marked exhibits ‘A’ and ‘B,’ and rescinded the said contracts upon the ground and for the reason that the plaintiff owed to the defendants, or any one of them, any sum or sums of money whatsoever which plaintiff refused to pay.

“The plaintiff further replying to the new matter alleged in the answer of the defendants to the second amended complaint, and therein entitled a ‘further and separate defense to said second amended complaint,’ and by way of new matter, alleges as follows:

“That upon numerous and divers times and occasions, all well known to the defendants, through the said defendants’ agents August William Fischer and Louis Henry Fischer, the plaintiff ordered from the said defendants, through their Fischer’s Flouring Mills and Corvallis Flouring Mills, in his, the plaintiff’s, own name, various quantities of cereals mentioned in the second amended complaint in exhibits ‘A’ and ‘B’ thereto attached, and the said defendants filled the plaintiff’s said orders for cereals well and fully knowing and understanding that the plaintiff was ordering the same in his own name, and accepted the plaintiff’s money therefor, when the plaintiff transmitted same to the defendants at the regular times and when the plaintiff remitted to defendants for various other quantities of cereals, and in the same manner and under the same circumstances as the plaintiff remitted to defendants for other quantities of cereals sent to customers upon requisitions made in the name of the customers; that the above methods of dealing in said cereals were well and fully known to the said defendants, and were acquiesced in by the defendants, and that said defendants never at any time prior to the filing of their answer herein objected to the same; and, therefore, the plaintiff alleges that the said defendants are at this time estopped to object thereto and use the same as a justification for their breach of the contracts mentioned in the second amended complaint, copies of which are thereto attached and marked exhibits ‘A’ and ‘B.’

There was a trial by the court without a jury, and a judgment for plaintiff, in the sum of \$17,534.26, less the sum of \$5,500, already in the hands of plaintiff. Defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Messrs. Yates & Yates* and *Mr. Thomas Mannix*, with oral arguments by *Mr. W. E. Yates* and *Mr. Mannix*.

For respondent there was a brief over the names of *Messrs. Wilson, Neal & Rossman, Mr. F. M. Saxton* and *Mr. Richard W. Montague*, with oral arguments by *Mr. George Rossman* and *Mr. Saxton*.

BENSON, J.—The first assignment of error to which our attention is directed is to the denial of defendants' motion for a nonsuit. This motion is directed to the sufficiency of the evidence to sustain the allegations of the complaint, and also to defendants' contention that the evidence conclusively establishes a breach of the contract upon the part of the plaintiff, himself, which must preclude him from recovering for any alleged breach by the defendants.

We shall consider the problems thus presented in inverse order. The violations of the contract which are charged against the plaintiff are, that he collected moneys from purchasers of cereals, contrary to the terms of the written agreement, and failed to turn such moneys over to his principal. It is conceded that from the stock of goods kept in Portland, according to the terms of the contract, plaintiff filled orders to customers, billing the goods in his own name, and collecting the money therefor, and that at the time when defendants refused to fill any further orders for plaintiff, the latter then had in his possession the sum of \$5,500 so collected, which he notified defendants he was holding as a partial reimbursement for the injuries which he had sustained by reason of their breach of the agreement. There is also evidence to the effect that practically from the beginning of the transactions involved herein, it was the custom of plaintiff to sell from the Portland stock in his own name, reporting and remitting to his principal therefor, by the twentieth day of the succeeding month, and

that this course of business was acquiesced in by the defendants. It is also in evidence that defendants at times, shipped goods to plaintiff's customers direct from the mill at Silverton and billed the same to plaintiff personally. To determine whether or not such evidence precludes the trial court from making a finding of fact "that the plaintiff faithfully performed his contract and was not in default," we must construe the contract under which the parties were acting. The plaintiff contends that the language of the instrument makes him a factor, who after making sales of his principal's goods, has the right to make collections, and that when he has done so, the money so received is his own, and that his relation to his principal, in this regard, is that of a debtor, whose delay in paying the debt is in no sense a breach of the contract. The defendants, upon the other hand, insist that the instrument creates no more than a simple sales agency, and that under the contract he is not authorized to make collections in any case, and that such action is a distinct breach of the compact. It will be noted that the contract contemplates two classes of transactions: the sale and shipment of goods from a warehouse in Portland, under the control of the plaintiff, and a like shipment from the mills at Silverton. It is also stipulated that the agent shall guarantee payment of all debts arising through his agency. The instrument is silent as to who shall make collection, except for whatever implication may be found in paragraphs XI and XII thereof, which read thus:

"XI. That the party of the second part is to guarantee the payment of all accounts, and any bills which are uncollectible are to be charged to the commission account of the party of the second part. Copies of all statements of accounts mailed each month are to be forwarded to the party of the second part.

"XII. A full account of all commissions earned is to be sent to the party of the second part each month by the party of the first part with a check to cover the same."

In 2 Mechem on Agency (2 ed.), Section 2497, we find this clear distinction between a factor and a broker:

"A factor is one whose business it is to receive and sell goods for a commission. He differs from a broker in that he is intrusted with the possession of the goods to be sold, and usually sells in his own name. He is invested by law with a special property in the goods to be sold and a general lien upon them, and their proceeds, for his advances; and, unless there be an agreement or usage to the contrary, he may sell upon a reasonable credit.

"One may be both a factor and a broker, and he may serve his employers in both of these capacities. When he acts as a broker his liabilities will be governed by the law applicable thereto; and the same is true when he acts as a factor. His rights and liabilities are not governed by the fact that he acts oftener in one capacity than the other, but rather in the capacity in which he acts in the particular transaction."

1-4. We therefore conclude that as to the stock of goods kept in Portland, from which sales were made, the plaintiff was a factor, and as to the shipments made from Silverton, he was a broker, and as to both classes of transactions, he was an agent selling upon a *del credere* commission, since he was required to guarantee the payment of all accounts. The weight of authority appears to be that a broker selling goods upon a *del credere* commission stands in the relation, to his principal, of an original debtor: *Lewis Bros. & Co. v. Brehme*, 33 Md. 412 (3 Am. Rep. 190). There is evidence in the record to the effect that the \$5,500

was all received from sales billed out by the plaintiff from Portland in his own name. As to whether or not the plaintiff had a right to do this, under his contract, is a doubtful question. The language of the instrument is vague and uncertain. It might reasonably be deduced that the provision to the effect that "a full account of all commissions earned is to be sent to the party of the second part each month by the party of the first part, with a check to cover the same," referred only to shipments made directly from Silverton to the customers, and the court properly admitted evidence of the practical construction of the contract by the parties, as indicated by their conduct. The court made a finding to the effect that prior to the date, when the money in the hands of the plaintiff, in accordance with the practice of the parties, should have been remitted, the defendants had violated the terms of the agreement by refusing to fill plaintiff's orders for cereals, and that the defendants had not discontinued the business of manufacturing cereals for sale in the territory covered by the agreement, and had not withdrawn from the cereal business in that territory, and there is evidence to support such findings. The contract is silent as to when remittances shall be made, and therefore the plaintiff could not be put in default by a failure to remit until after a reasonable time had elapsed and a demand made: 2 Mechem on Agency (2 ed.), § 2544.

5. It is further urged that plaintiff has admitted his own prior default in his reply to the answer, and that such reply constitutes a departure from the cause of action set forth in the complaint. This contention is based upon the allegations of defendants' affirmative answer, to the effect that, in violation of the terms of the agreement, plaintiff had sold cereals to various

customers, billing the same in his own name as the seller, and failing, in many instances, to notify defendants of the names of the purchasers, and collecting the moneys therefor, and neglecting to transmit the same to defendants. In reply thereto, the plaintiff makes the following allegation:

“That upon numerous and divers times and occasions, all well known to the defendants, through the said defendants’ agents August William Fischer and Louis Henry Fischer, the plaintiff ordered from the said defendants, through their Fischer’s Flouring Mills and Corvallis Flouring Mills, in his, the plaintiff’s, own name, various quantities of cereals mentioned in the second amended complaint in exhibits ‘A’ and ‘B’ thereto attached, and the said defendants filled the plaintiff’s said orders for cereals well and fully knowing and understanding that the plaintiff was ordering the same in his own name, and accepted the plaintiff’s money therefor, when the plaintiff transmitted same to the defendants at the regular times and when the plaintiff remitted to defendants for various other quantities of cereals, and in the same manner and under the same circumstances as the plaintiff remitted to defendants for other quantities of cereals sent to customers upon requisitions made in the name of the customers; that the above methods of dealing in said cereals were well and fully known to the said defendants, and were acquiesced in by the defendants, and that said defendants never at any time prior to the filing of their answer herein objected to the same; and, therefore, the plaintiff alleges that the said defendants are at this time estopped to object thereto and use the same as a justification for their breach of the contracts mentioned in the second amended complaint, copies of which are thereto attached and marked exhibits ‘A’ and ‘B’.”

We are unable to discover wherein this averment admits any violation of the terms of the compact. It recites acts which, if true, disclose a course of conduct

indicating a practical interpretation of the contract, and contends that it is now too late for defendants to repudiate such interpretation.

6, 7. Finally it is urged that there is no legal evidence in the record upon which the court could base an estimate of the amount of plaintiff's recovery. There is evidence to the effect that plaintiff, prior to, and at the time when he began operations under the contract in question, was a jobber in certain specified lines of groceries; that he maintained an office in Portland, had office help, employed traveling salesmen, etc.; that the increase in business required enlarged quarters, more help and increased expenses. This is followed by exact figures as to his gross commissions from the sale of cereals during the years while the contract was in force, the net commissions for each year after deducting discounts, expenses and losses. The expenses of this business, as carried on in connection with the other business of plaintiff, was computed by comparison of the volume of business in each line, and the expense naturally connected with each. There was a comparison of the business of the first year with that of the second, and an estimate of the comparative increase of sales, owing to advertising, improved quality of the goods and an increased acquaintance therewith by a steadily increasing list of customers, and an estimate of the probable increase in the volume of business during the remaining years of the contract. This kind of evidence, we think, is clearly competent, and sufficient foundation for a verdict or judgment, under the authority of the rulings of this court in a number of cases, including *Bredemeier v. Pacific Supply Co.*, 64 Or. 576 (131 Pac. 312), and *McGinnis v.*

Studebaker, 75 Or. 519 (146 Pac. 825, 147 Pac. 525, Ann. Cas. 1917B, 1190, L. R. A. 1916B, 868).

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ.,
concur.

Argued July 2, reversed and suit dismissed July 29, rehearing denied
September 9, 1919.

HOUCK v. HOUCK.*

(183 Pac. 3.)

Deeds—Delivery—Evidence.

1. In suit by a son against his mother and the other children of her and the deceased father to recover the home farm claimed to have been deeded to him in consideration of his agreement to support his parents, evidence held to show that it was not the purpose of the parents at the time of the alleged transaction to deliver their deed to the son or part with title to the property.

Deeds—Delivery.

2. Delivery of a deed, to be valid, must be such as deprives the grantor of the possession and control of the instrument.

Deeds—Delivery—Burden of Proof.

3. In suit by a son against his mother and the other children of her and her deceased husband to recover the home farm claimed to have been deeded to him in consideration of his agreement to support his parents, the burden to prove delivery of the deed to the son was upon him.

Deeds—Delivery—Intention.

4. In the absence of intention on the part of parents to deliver to their son a deed to the home farm in consideration of his agreement to support them, there was no delivery of the deed.

[As to delivery of deed as question of law or fact, see note in Ann. Cas. 1914D, 108.]

From Josephine: FRANK M. CALKINS, Judge.

Department 2.

The plaintiff is a son of David Houck, now deceased, and Hilla A. C. Houck, who in April, 1907, were the

*The question of intention of grantor necessary to delivery of deed is discussed in a note in 12 L. R. A. 173. REPORTER.

owners of a portion of the John Thomas and Norman Patterson donation land claim situate in Josephine County, embracing 187.23 acres. The defendants are the surviving widow of David Houck and the sons and daughters of David and Hilla A. C. Houck.

The plaintiff alleges that in April, 1907, for a valuable consideration, David and Hilla A. C. Houck conveyed to him "the said property and premises by warranty deed containing general covenants of warranty, and the plaintiff thereupon entered upon said premises and took possession of the same and ever since has been and still is the owner thereof in fee simple and in possession thereof"; and:

"Plaintiff further alleges, that he failed to cause said deed to be recorded, but retained the same awaiting a convenient time for transmitting the same to the recording officer of said county, and that subsequently the defendant, Hilla A. C. Houck, or some of the other defendants herein, wrongfully and unlawfully, and without right or authority so to do, destroyed said deed, and by reason thereof the plaintiff has been deprived of his muniment of title to said lands, and is unable to complete his record title of the same."

It is then averred that subsequent to the execution of the deed David Houck died; that the plaintiff and the defendants are his only heirs and that the latter dispute the plaintiff's title and claim that he has no right in the property, although he is the owner in fee simple. He prays that he be decreed such owner and entitled to possession of the premises.

All of the defendants except George Houck filed a joint answer, in which it is admitted that in April, 1907, Hilla A. C. Houck and David Houck were the owners of the premises in controversy, but they deny the execution of the deed to the plaintiff, that the lat-

ter ever had possession of the deed, that it was ever destroyed or that the plaintiff ever had or now has any interest in the premises except as an heir of David Houck, deceased.

For a first further and separate answer it is alleged that in 1903, as the result of illness and debility from old age, David Houck became demented and of feeble mind, which affliction continued to grow and was in progress up to the time of his death on May 13, 1908; that during this period his faculties were so impaired as to render him wholly irresponsible to care for himself, to transact any business or execute any deed or contract; that he was a constant care and burden to his wife and that at the time of his death he was seventy-seven years of age and his wife was more than seventy years old. It is further alleged that by reason of the mental and physical condition of his parents and the inducements and promises of the plaintiff, the defendant Hilla A. C. Houck, in April, 1907, entered into a contract with him by which he promised and agreed to care for his father and mother during the remainder of their lifetime and furnish all their necessities and comforts, to pay the taxes, keep up the improvements and cultivate the premises in a prudent manner, in consideration of which Hilla A. C. Houck agreed with the plaintiff that upon her death he should have an undivided half interest in the premises; that he should have possession thereof for his own use, and of the personal property thereon, until her death, and that such half interest was of the reasonable value of \$5,000 to \$10,000 and of the rental value of \$100 per annum.

It is averred that soon after the execution of the contract the plaintiff began a system of neglect and disregard and pursued an unnatural course of con-

duct toward his parents; that he left the State of Oregon and was absent for a period of about six months; that the premises were left entirely in charge of his mother, in violation of the contract; that the plaintiff knew David Houck required constant care, nursing and attention; that after the latter's death he continued to violate his agreement and failed and neglected to provide or care for his mother, leaving her entirely to her own resources and the charity of her other children; that he failed to pay the funeral expenses or provide a monument for his father; that such expenses were paid by his mother out of the money which she received as the pension of her deceased husband, and that by reason of such mistreatment and neglect, Hilla A. C. Houck left the premises in 1910, in order to regain her health and strength, and lived with her other children for about one year. It is alleged that upon her return in 1911 she was ill and unable to work, and on account of the continued neglect by the plaintiff in violation of his contract, and for her comfort and protection, she finally left the plaintiff, since which time she has resided with her other children, and that by the acts of the plaintiff she is fully discharged and relieved from carrying out the provisions of the contract.

For a second further and separate answer the defendants aver that between the years 1908 and 1916, inclusive, the plaintiff had the exclusive use of the disputed property and that the reasonable rental value thereof is \$100 per annum; and that Hilla A. C. Houck is the duly appointed, qualified and acting administratrix of the estate of David Houck, deceased, wherefore defendants pray for an accounting for the rental value of the premises and judgment for that amount.

As a reply the plaintiff admits that he entered into a contract with Hilla A. C. Houck and David Houck during the latter's life, in April, 1907, wherein he agreed to care and provide for them and to furnish them with necessities during their lifetime, and that he has been in possession of the premises during the years 1908 to 1916, "except up to and including 1910, when the premises were being operated by a lessee." He further admits that there has never been an accounting, but denies all other material allegations.

The trial court made findings sustaining the allegations of the complaint and to the effect that while the deed and contract were in the custody and possession of the defendant Hilla A. C. Houck she destroyed them without the knowledge or consent of the plaintiff; that upon the service of the summons in this suit, and without just cause, she left the premises where the plaintiff resides and has refused and still refuses to accept maintenance and support furnished by the plaintiff under the provisions of the contract; that such acts on her part were without just cause; that the defendants knew of the execution of the deed and contract and that they had never made any objection to the manner of performing the agreement prior to the filing of the answer in this suit. Upon such findings the court made conclusions of law and based thereon rendered a decree in favor of the plaintiff, from which the defendants appeal, assigning ten alleged errors.

REVERSED AND SUIT DISMISSED.

For appellants there was a brief with oral arguments by *Mr. George W. Colvig* and *Mr. Fred A. Williams*.

For respondent there was a brief and an oral argument by *Mr. H. D. Norton*.

JOHNS, J.—The plaintiff claims that in April, 1907, his father and mother executed to him a warranty deed by which they conveyed the premises in dispute; that he then became, ever since has been and now is the owner thereof in fee simple and that he then took and has ever since retained possession. The defendants specifically deny each of these contentions.

The complaint is silent as to any contract between the plaintiff and his parents. The defendants allege the execution of a contract between the plaintiff and the defendant Hilla A. C. Houck only, by which the plaintiff agreed to care and provide for both of his parents during their lifetime, in consideration of which the mother promised to convey to him her undivided half interest in the property effective upon her death, pending which he was to have the use and possession of the premises. The reply "admits that the plaintiff and the defendant Hilla A. C. Houck and her said husband while living entered into a contract on or about April, 1907, wherein the plaintiff agreed to care and provide for the said Hilla A. C. Houck and her husband during their lifetime."

The land was free of any encumbrance and had a reasonable value of from \$10,000 to \$12,000. The liabilities of the parents, if any, did not exceed \$200. At the time of the alleged transaction the son George had a five-year lease of the premises, which he took in 1906, holding the property until 1910 at an agreed annual rental of \$100.

David Houck was a Grand Army man, receiving a government pension. He was about seventy-seven years old and his wife was past seventy. Their life was simple and their wants were few. The mother was then able to attend to her household duties and

was well and active for one of her age. The father was more or less helpless and in need of care and attention.

After some correspondence between them, the plaintiff, who was then twenty-six years old, returned from Nevada, where he was working in the mines, to the home of his parents. Within five days after he came back he went to Kerby and employed J. H. Austin, an attorney, to come to the family home and prepare some papers. For that purpose the attorney brought with him his wife, Isabel Austin, who acted as his clerk, and a typewriter. After some conversation with the old folks, from whom a description of the property was obtained, Isabel Austin, under the direction of J. H. Austin, prepared a deed to the land in question, using a blank form, and in connection therewith, as a part of the transaction, in consideration of the deed a contract was prepared by which the plaintiff was to take care of and provide for his parents for the remainder of their lives. Before the execution, the agreement was read over to David Houck and the deed and contract were then duly executed by the respective parties.

Many other points are raised, but the vital question is as to whether the papers were then actually delivered and whether the contract was executed or executory. The plaintiff claims that at the time of the execution of the papers his father and mother, the Attorney Austin, Mrs. Austin, Cy Ducommun and himself were present and that Ducommun and Mrs. Austin acted as witnesses. This transaction took place about April 25, 1907, and the consideration in the deed was one dollar. Concerning the disposal of the papers, the plaintiff testified as follows:

"Q. What was done with the deed upon its being executed by the parties?

"A. It was turned over to me and I gave it to my mother to keep.

"Q. Was it—you say it was turned over to you, explain what was done in the way of turning it over to you.

"A. Well, after it was all drawed up, signed, it was handed to me.

"Q. Into your hands?

"A. Yes.

"Q. How long did you keep it in your personal custody?

"A. Well, it was—I gave it to my mother to put with the other papers, she always kept all of the papers.

"Q. What was the purpose in giving it to your mother, what was the arrangement, if any, about that?

"A. Well, for safekeeping, I suppose.

"Q. Was there anything said about recording it?

"A. Yes, she said now to have that put on record.

"Q. Who said that?

"A. My mother, right there.

"Q. What did you say?

"A. Well, I don't remember just the words I said, now.

"Q. Did you put it on record?

"A. No, I didn't.

"Q. Why not?

"A. I just neglected it.

"Q. I understand you to say that there was a contract also drawn.

"A. Yes, sir. * * Yes, there was a contract separate from the deed.

"Q. Who signed the instrument?

"A. My father and mother and myself.

"Q. What was done with that instrument when it was signed up?

"A. That was just pinned to the deed.

"Q. Now have you ever seen those instruments since they were left with your mother for safekeeping?

"A. No, I have not.

"Q. Do you know what became of them afterwards?

"A. Only through hearsay, I heard they was burned up.

"Q. When did you first learn that this deed had been destroyed?

"A. About 1913.

"Q. Did you try to get the papers afterwards for recording?

"A. No.

"Q. What did this contract provide that you should do in the way of maintenance and support?

"A. It just stated I was to take care of my father and mother, their lifetime.

"Q. Now, Mr. Houck, what did you do in the way of providing for them and performing your part of the contract?

"A. I done the best I could.

"Q. Well, go ahead and tell the court in a general way about that.

"A. I provided for the house in every way.

"Q. State whether or not you furnished them the necessities of life there.

"A. Yes, I did. I always furnished the table.

"Q. Now who—where did you live after that contract was made?

"A. Lived on the home ranch.

"Q. Right on this ranch which was the property in controversy now?

"A. Yes, except about six months I went away to work one time.

"Q. Now, where did your mother and father live thereafter?

"A. They lived at the home ranch.

"Q. In the same house with you?

"A. Yes, sir.

"Q. How long did your father live after this transaction was entered into?

"A. About thirteen months."

The evidence shows that his mother continued to live with him until 1916, when she left, and that the occasion of her leaving was the service of the summons in this suit. The plaintiff's further testimony follows:

"Q. I will ask you to state whether or not your mother before you commenced this suit, whether or not she repudiated this deal that you had made.

"A. Yes, she did.

"Q. Was that in personal conversation with you or otherwise?

"A. In personal conversation.

"Q. Go ahead and state what she said now about it.

"A. Well, at different times she ordered me away.

"Q. And what was said about carrying out the contract so far as she was concerned?

"A. There was nothing said about that.

"Q. You mean she ordered you off the place at different times?

"A. Yes. * *

"Q. And who was at home at the time you got home, who was making the home there?

"A. My brother George had the place rented.

"Q. How long before that had you discussed the matter of deeding you the premises together with the contract to take care of your father and mother?

"A. Never discussed it at all.

"Q. Had you ever discussed it with any of the members of the family?

"A. No, sir.

"Q. Had you broached the subject at all to your mother and father?

"A. No, sir.

"Q. You remember this Mr. Austin was your attorney, was he?

"A. He drew up the contract and deed.

"Q. Was he your attorney, did you hire him?

"A. I paid him.

"Q. What was said, who broached the subject of deeding this land to yourself, your mother and your father, or yourself?

"A. They had me come from Nevada, that is the promise they made me, if I would come baek and take care of them they would deed me the ranch.

"Q. Who made you the promise?

"A. My mother and oldest brother, * * David Elwood."

He also testified that his father was an old man, in poor health. In regard to caring for his parents, he said:

"Q. What do you mean, was that all there was to it, just that you should take care of them?

"A. And for the consideration—the consideration in the contract was that I should have the property.

"Q. And in case you didn't take care of them or didn't look after them, then the property was to go back to them?

"A. Why, I suppose so.

"Q. Is that the idea?

"A. Yes, sir. I suppose that is what the contract was for. * *

"Q. Who, did you say, had the running of the ranch at that time?

"A. My brother George.

"Q. How long was his lease, when did his lease expire?

"A. He had the ranch for five years, he had four years more.

"Q. And did you make any objection to this lease?

"A. No, I didn't.

"Q. You didn't make any objection to it?

"A. Only that he was to furnish their table, that is what they told me, I never saw the lease, and they claimed he was to furnish their table and he did not do it and that is all the objections I made.

"Q. What did you do towards taking care of your father and mother from that time on?

"A. I provided the table and the house."

He also testified that his mother went to Portland in 1911 and was gone about eleven months and that he gave her fifteen dollars when she left and sent her twenty dollars when she was coming home. Regarding any advances of money made to him by his mother, he testified on cross-examination as follows:

"Q. Have you ever repaid your mother for any of these advances she has made to you?

"A. She only made one, twenty dollars.

"Q. That is all she ever made to you?

"A. Yes, sir.

"Q. Did you ever repay her for the thirty dollars, or for the tombstone that she put up at your father's grave?

"A. No, sir.

"Q. And you never offered to repay the boy that took care of her in 1910 when you were away, you have never offered to repay them, have you?

"A. They have never asked me for anything. * *

"Q. How long did Robert live with the family after you went into possession of the premises?

"A. He has been there until last spring.

"Q. Well, if you did, when you did leave the ranch who was there to take care of your mother?

"A. Well, Robert was there when I was away, he stayed there all of the time."

When the defendant Hilla A. C. Houck was seriously ill in 1914, Dr. Dickson was called from Kerby to attend her and the plaintiff testifies that his mother paid the doctor's bill. In answer to the question, "Did she ever complain of any lack of attention?" he said, "Oh, yes, she was always complaining."

With reference to his brother George's lease, the plaintiff testified:

"A. He rented it in 1906 for five years and he had it four years.

"Q. Then you went back to Nevada in '10, didn't you?

"A. Yes, sir.

"Q. So you didn't take possession of the place until you got back from Nevada, did you, Mr. Houck?

"A. Well, I was there all of the time.

"Q. And you say your brother had it leased until 1910?

"A. Yes, sir.

"Q. He run the ranch there?

"A. He run the ranch there, yes, sir.

"Q. So you were not in possession of the ranch at that time, were you?

"A. No, sir. That is, I didn't run the ranch."

Concerning the deed and contract, Mrs. Isabel Austin testified thus:

"The agreement was, as nearly as I can remember, a contract on the part of J. G. Houck to care for his father and mother during their lifetime, while they agreed that he was to have the home farm and certain stock, I believe, in return therefor. * * The original of the agreement was delivered, after being duly signed, to David Houck and Hilla Houck. The copy or duplicate was, I think, given to J. G. Houck."

She stated, also, that she witnessed the execution of the papers.

J. H. Austin testified that he was by occupation an attorney, then residing at Kerby, Oregon, and that:

"I drew up a deed for David Houck and his wife, Hilla A. C. Houck, in which they deeded their farm on which they were living at that time to their son, J. G. Houck. I also at the same time drew up an agreement between the said David Houck, Hilla A. C. Houck and J. G. Houck. In this agreement, it was agreed between J. G. Houck, their son, and David Houck, his father, and Hilla A. C. Houck, his mother, that for the consideration of the said deed the said J. G. Houck should take care of the said David Houck and Hilla A. C. Houck during the remainder of their lives."

The witness stated that he prepared both papers according to the instructions of the plaintiff's parents

and that the same were duly signed, witnessed and acknowledged. Regarding the delivery of the papers, he said:

"The deed * * was delivered to J. G. Houck by David Houck in my presence and I think in the presence of Cy Ducommun and Mrs. Isabel Austin and Hilla A. C. Houck. I remember telling J. G. Houck he should have it recorded, and he said something about doing so and handed the deed to his mother."

Cy Ducommun, a witness for the defendants, testified that he was not in Oregon, but in the State of Nevada, at the time of the alleged transaction and that he did not witness either the alleged deed or contract.

The defendant Hilla A. C. Houck denied the execution of the alleged deed or contract and gave testimony tending to show that no deed was ever executed by either herself or her husband, and that the contract was the one set forth and alleged in the answer, by which she, only, agreed that if the plaintiff would care for and support his parents during the remainder of their lives, in consideration thereof she would convey to him her undivided half interest in the land, to take effect at her death, pending which the plaintiff should have possession of the same. She further testified:

"Q. What was done with the contract or the instruments that were signed, after they were signed?

"A. Mr. Austin turned and handed it to me.

"Q. What did you do with it?

"A. I took it and put it away.

"Q. How long did you have the custody of that?

"A. Well, I had it from the time it was signed in—along in April, 1907—until the time that I started for Portland in 1909 or '10. * *

"Q. What did that contract provide for?

"A. It provided for him to take care of me, do for me kindly and lovingly. * *

"A. I says, 'Well, what will be done with this?' Now I am going to use his [plaintiff's] language. He says, 'I don't care what in hell becomes of it if I had my seven dollars and a half back, I don't care if the ranch went to hell,' was his language that he used to me. * * That was right there within fifteen minutes after they drove away with the buggy—in the buggy.

"Q. Jacob Houck, then, never had this contract in his possession?

"A. He never had it right then. Then and there when he used that language to me, thinks I, 'Old boy, I will watch you for awhile before this goes on record.' From day to day things went a little more and a little more until I could not put up with it."

The above is substantially all of the testimony concerning the execution of the deed and contract and the delivery and custody thereof.

This is a transaction between aged and infirm parents on one side and their twenty-six year old son on the other, wherein the papers were prepared and acknowledged by an attorney employed and paid by the son. Neither of the other heirs was present at the time or had any exact knowledge that the papers were executed. Robert Houck, a brother of the plaintiff, was then living on the farm and George Houck, another brother, had it leased at that time. Yet, according to the plaintiff's own testimony, they were not consulted and did not know anything about the transaction. There is no evidence of any friction between the parents and any of their children, that they had any preference for one over the others or that there was any reason for preference.

Assuming that the plaintiff's testimony is true and that he kept and performed his alleged agreement, the old folks received nothing more therefrom than the

privilege of continuing to reside where they had lived for thirty-nine years, and to have the simple necessities of life furnished them, in consideration of which the plaintiff then received a fee-simple title to and the use and enjoyment of their old home, which was of the reasonable value of \$10,000 to \$12,000. Outside of their actual household expenses, there is no evidence that the plaintiff furnished his parents money in excess of \$100 for the nine years, and there is evidence that during that period they paid out more than that amount on the maintenance and upkeep of the farm.

It must be conceded that as owners in fee simple, the parents had a legal right to dispose of their property by deed or will, in their own discretion. But this is a suit to enforce a deed founded upon a contract. The plaintiff testified that there was a contract; that it was pinned to the deed and that together the instruments were delivered to his mother. According to his own statements, the matter was never mentioned or discussed between them thereafter, and he was advised in 1913 that his mother had destroyed the papers. He was told by his attorney to have the deed recorded, and the only reason which he assigns for not having done so, is the statement, "I just neglected it." He further testified that he never saw the instruments after they were left with his mother for safekeeping. and that he never tried "to get the papers afterwards for recording."

R. P. George, a land owner and neighbor of the Houcks, testified that at the time the disputed property was leased by George Houck it had an annual rental value of \$300 to \$400, and there is testimony tending to show that it yielded at least ninety tons of

hay yearly; that it had a good water right and that the cultivated land was very productive.

1. Under all of the facts and surrounding circumstances, we think that it was not the purpose or intent of the plaintiff's parents in April, 1907, to deliver the deed or part with the title to their property. According to the plaintiff's testimony, the contract was pinned to the deed and was the consideration therefor. He also stated that if he did not take care of his parents the property was to go back to them, and that, "I suppose that is what the contract was for."

2. As to delivery, the law is well stated in *Hill v. Kreiger*, 250 Ill. 408 (95 N. E. 468):

"In the case of an ordinary deed of bargain and sale it is indispensable, whatever means may be adopted to accomplish its delivery, that the deed passes beyond the dominion and control of the grantor, since both the grantor and the grantee cannot have control of the deed at the same time."

13 Cyc. 562, 563, says:

"It is a general rule, subject to certain exceptions herein given that a delivery of a deed to be valid must be such as deprives the grantor of the possession and of the control of the instrument. * * It does not necessarily follow from the fact that the grantee has possession of the deed that there has been a delivery of the instrument, for it may have come into his hands without any intent on the part of the grantor to make a delivery."

8 R. C. L. states the rule thus:

"Delivery is essential to the validity of a deed. It is the final act which consummates the deed, is as necessary as the seal or signature of the grantor, and without it all other formalities are ineffectual and the deed is void *ab initio*, being at most a mere proposition to convey, which may be withdrawn at any time before acceptance by the other party. Delivery has been called the life of a deed" (page 973).

"While delivery may be by words or acts, or both combined, and manual transmission of the deed from the grantor to the grantee is not required, it is an indispensable feature of every delivery of a deed, whether absolute or conditional, that there be a parting with the possession of it and with all power and control over it, by the grantor, for the benefit of the grantee, at the time of the delivery. * * In other words, delivery may be effected by any act or word manifesting an unequivocal intention to surrender the instrument so as to deprive the grantor of all authority over it or the right of recalling it; but if he does not evidence an intention to part presently and unconditionally with the deed, there is no delivery" (page 985).

3. The burden of proof was upon the plaintiff. He was dealing with his aged and infirm parents. The deed and contract were prepared by an attorney employed and paid by him, and by his own testimony it was an unconscionable and unreasonable agreement, by which his parents were then to part with the title to all their property, in consideration of which he was to provide "the house and the table." The house was their old home and the table was largely supplied with the products of the farm. There are strong reasons for holding that this is an instance in which the parents should have had independent advice in the preparation and execution of the deed and contract. There was nothing but a nominal consideration to support the conveyance of their property, which was of the reasonable value of at least \$10,000.

4. We hold that there was no delivery of the deed and that upon the record before us the plaintiff does not have any standing in a court of equity.

The decree is reversed and the suit dismissed.

REVERSED AND SUIT DISMISSED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Motion to dismiss appeal submitted January 14, overruled January 21, second motion to dismiss filed January 29, overruled February 25, on the merits submitted on briefs June 4, modified July 15, rehearing denied September 9, 1919.

ROBINSON v. PHEGLEY.

(177 Pac. 942; 178 Pac. 799; 182 Pac. 373.)

Appeal and Error—Order Extending Time for Filing Transcript—Date of Taking Effect.

1. An order extending time for filing transcript pursuant to Section 554, subdivision 2, L. O. L., is made when it is in writing and signed by the judge, in view of Section 534, but is not effective until delivered to the clerk.

Appeal and Error—Order Extending Time for Filing Transcript—"Filing."

2. Order extending time for filing transcript *held* sufficiently filed; "filing" not being merely the indorsement which the clerk makes, but the fact that the instrument is placed in his custody with intent to make it effective.

Appeal and Error—Notice of Appeal.

3. Under Deady & Lane Gen. Laws, Chapter 6, Section 527, as amended by General Laws of 1899, page 227, notice of appeal may be signed by the party appealing or his attorney.

Appeal and Error—Notice of Appeal—Description of Decree—Sufficiency.

4. Notice of appeal *held* to sufficiently describe decree appealed from.

Appeal and Error—Specification of Errors—Dismissal.

5. Though appellant's abstract did not contain an assignment of errors, as required by Rules 11 and 12, 89 Or. 715-717 (165 Pac. viii), *held* that as the failure to furnish specification of errors is not jurisdictional, and as it appeared from an affidavit of appellant's attorney, showing that the time to file an abstract was short when he came into the case, and that through haste he omitted to file an assignment of errors, the appeal should not be dismissed, and appellant should be permitted to amend the abstract.

Corporations—Mortgages—Execution and Consideration—Evidence.

6. Mortgage of corporation, which mortgage plaintiff purchased from defendant *held* duly executed for a valuable consideration.

Corporations—Mortgage—Assignment—Rights of Assignee.

7. Where plaintiff to protect her interests in a corporation purchased a \$6,000 note and mortgage from defendant upon representation that he was owner and holder in his own right, and under agreement that plaintiff was to pay dollar for dollar of what he had put into the property, and defendant concealed from plaintiff that he was to have and

did receive a fee of \$2,000 out of the note and mortgage for his services as trustee, *held* defendant will be required to pay over to plaintiff the \$2,000, though the mortgage at time of purchase constituted a valid and subsisting lien on the property of the corporation.

Appeal and Error—Equity Suit—Trial De Novo.

8. The suit being in equity, it is tried *de novo* in the Supreme Court. BURNETT, J., Dissenting.

Overruled January 21, 1919.

MOTION TO DISMISS.

(177 Pac. 942.)

Mr. Ralph A. Coan and Mr. C. A. Sheppard, for the motion.

Mr. Wilson T. Hume, contra.

From Multnomah: GEORGE B. BAGLEY, Judge.

In Banc.

McBRIDE, C. J.—This is a motion to dismiss an appeal. The grounds assigned are: (1st) That the transcript was not filed within the time prescribed by statute, or within any extension of that time; (2d) That the notice of appeal is signed by the appealing party and not by her attorney, and (3d) That the notice of appeal does not sufficiently describe the judgment. On the face of the transcript it appears that after perfecting her appeal plaintiff secured two orders extending the time to file the transcript. The first order granted an extension of fifty days, and before this time elapsed another order was made extending the time until November 1, 1918. It further appears from the transcript that an order further extending the time and dated October 15th was filed and entered on November 7th, the date of such filing being not within any extension theretofore granted. It is

claimed that the failure to file the order dated October 15th, before the expiration of the time granted by the previous order, deprives this court of jurisdiction.

By Section 554, subdivision 2, L. O. L., it is provided that the time may be extended by an order of the court or judge thereof, but that such order must be made within the time allowed to file the transcript. Section 534 defines an order as follows:

“Every direction of a court made or entered in writing and not included in a judgment or decree is denominated an order.”

1, 2. Clearly the order is *made* when it is in writing and signed by the judge, but in our opinion it is not effective until delivered to the clerk. There is no provision of the statute requiring the entry of orders of this character in the journal and the practice in that respect varies in different districts of this state.

The appellant has filed here the affidavit of the presiding judge that he signed the order on the 15th of October, as the date indicates. There is also an affidavit of J. M. Rogers, a deputy county clerk, to the effect that the order was made and signed by the judge of the Circuit Court on October 15, 1918, and delivered by the judge to him and by him entered and recorded in the record of orders and was thereafter delivered to another deputy clerk for manual copying in the journal of the court. We think this was a sufficient filing. The order was actually in the record with the intent that it should be effective and the filing of a paper is not merely the indorsement which the clerk makes upon it, but the fact that it is placed in his custody with the intent to make it effective.

The affidavits of the judge and deputy clerk being uncontradicted, we shall treat the order as having

been properly made. They amount to an official certification of what was actually done and explain the apparent discrepancy between the date of the order and its entry on the journal.

3. The objection that the notice of appeal is signed by the party instead of the attorney is not well taken. Under the statute, as it existed prior to 1899, it was held in *Poppleton v. Nelson*, 10 Or. 437, that a notice signed by a party who had an attorney of record was insufficient. The statute then in force (Section 527, Deady & Lane Code) provided that "the appellant shall cause a notice to be served on the adverse party," etc. By Gen. Laws, 1899, pp. 227, 228, this section is amended so as to read, "The party desiring to appeal may cause a notice signed by himself or attorney to be served upon the adverse party," etc. There can be no question but that this amendment authorizes the party appealing to sign the notice. It was probably passed to avoid the somewhat strained construction given to the former statute in *Poppleton v. Nelson*, 10 Or. 437, which had already been criticised by Justice THAYER in *Shirley v. Burch*, 16 Or. 1 (18 Pac. 344).

4. We think the notice sufficiently describes the decree appealed from. The notice states the title of the cause; is directed to the defendant and his attorneys, and reads as follows:

"You are hereby notified that the plaintiff appeals to the Supreme Court of the State of Oregon from the decree entered in the above-entitled court and cause on the 19th day of April, 1918, and that such appeal is from the whole of said decree and each part thereof.

"(Signed) EMMA G. ROBINSON, Plaintiff."

Here it will be seen that the appeal is from a decree of the Circuit Court of Multnomah County, in a cause

in which the appellant was plaintiff and respondent was defendant, and which decree was rendered on April 19, 1918. It would be difficult to make the description more specific without including much useless detail. This court has always been averse to dismissing appeals on account of mere technical defects in the notice, where it has been evident that no one could be misled by a slight defect or omission. A notice almost identical in terms with that here discussed was held sufficient in *Fraley v. Hoban*, 69 Or. 180 (133 Pac. 1190, 137 Pac. 751).

The motion to dismiss the appeal is overruled.

OVERRULED.

Overruled February 25, 1919.

SECOND MOTION TO DISMISS.

(178 Pac. 799.)

Mr. Ralph A. Coan and Mr. C. A. Sheppard, for the motion.

Mr. Wilson T. Hume, contra.

PER CURIAM.—Defendant moves to dismiss the appeal for the reason that the abstract filed by appellant does not contain an assignment of errors, as required by Rules 11 and 12 of this court: 89 Or. 715-717 (165 Pac. 8). Appellant's attorney files a counter notice for leave to file an amendment to the abstract, specifying the errors relied upon, and files an affidavit showing that the time, within which to file an abstract, was short when he came into the case and that through haste he omitted to include a specification of errors therein. The failure to furnish a specification of errors is not jurisdictional, and it is plain that such

omission has not worked any disadvantage to respondent.

Under all the circumstances we think it would not be in the interests of justice to dismiss this appeal for a mere technical failure to comply with the rules. The plaintiff will be permitted to amend the abstract and the motion to dismiss will be overruled.

OVERRULED.

Submitted on briefs June 4, modified July 15, 1919.

ON THE MERITS.

(182 Pac. 373.)

In Banc.

The third amended complaint was filed on August 2, 1916, in which the plaintiff prayed for judgment against the defendant for the sum of \$34,345.43, with accrued interest from June 11, 1907, "and for such other, further and different relief to which plaintiff may be entitled and which to equity may seem meet." To this complaint a demurrer was sustained by the trial court and the plaintiff appealed to this court, where the case was "reversed and remanded with directions" in an opinion by Mr. Justice McCAMANT, 84 Or. 124 (163 Pac. 1166). By that opinion it was decided that the plaintiff did not have any cause of suit against the defendant, except as to the \$6,000 mortgage described in her complaint, which had been foreclosed by the decree of the Circuit Court for Josephine County.

As to that mortgage, the complaint alleges that in the year 1907 the Galice Consolidated Mines Company was an Oregon corporation and the owner of valuable

mining property in this state; that the plaintiff was then a stockholder and had an investment of more than \$15,000 therein:

“That at said time the defendant represented to the plaintiff that he had certain *bona fide* and legal claims against said corporation aggregating the sum of nine thousand six hundred (\$9,600.00) dollars, and that said claims represented moneys actually paid, laid out and expended by him, the said defendant, for and on behalf of said corporation, and the plaintiff relying on the truthfulness of said representations and in order to protect her interests in said corporation, agreed to purchase from the said defendant his interest in and against said corporation for and in consideration of the payment by the plaintiff to the defendant of the sums actually paid, laid out and expended by the defendant, for and on behalf of said corporation, and for which said corporation was represented by the defendant to the plaintiff to be liable to him; that defendant further required of plaintiff the performance by her of the duties imposed on defendant under the terms of a certain contract between himself and one T. K. Anderson, et al., bearing date March 16, 1907; that a true copy of said last mentioned agreement marked Exhibit ‘A’ is filed herewith and prayed to be read as a part hereof.

“That among the amounts which the defendant represented to the plaintiff to have been so paid, laid out and expended by him, was the sum of six thousand (\$6,000.00) dollars secured by a mortgage upon the properties of said corporation; that defendant proceeded to foreclose said mortgage and to acquire and did so acquire at the sheriff’s sale the legal title to the property of said corporation, thus rendering valueless except as to the corporation’s equity of redemption, the stock interest of plaintiff herein.

“That thereupon on the 11th day of June, 1907, the plaintiff, relying as aforesaid upon the truthfulness of the representations of the defendant hereinbefore set forth and upon the validity and good faith of said

mortgage and the proceeding to foreclose same, paid to the defendant the sum of forty-eight hundred (\$4,800.00) dollars, as the equivalent of one-half of the amount asserted by the defendant to be due him from said corporation and assumed one-half of the burdens of defendant under the contract with Anderson referred to as Exhibit 'A' herewith and at the time of purchasing said one-half interest, plaintiff and defendant entered into an agreement, a true copy of which is hereto attached marked Exhibit 'B' and prayed to be read as a part hereof; and thereafter, on or about October 19, 1907, plaintiff paid to the defendant an additional sum of forty-eight hundred (\$4,800.00) dollars, representing the remaining one-half of the burdens of defendant under the contract with Anderson referred to as Exhibit 'A' herewith, and at the time of purchasing said one-half interest, plaintiff and defendant entered into an agreement, a true copy of which is hereto attached, marked Exhibit 'C' and prayed to be read as a part hereof.

"That in truth and in fact, the said sum of six thousand (\$6,000.00) dollars represented by said mortgage was not paid, laid out or expended by plaintiff (defendant) for said corporation, nor was any part thereof so advanced; that the pretended indebtedness of the corporation to the defendant in said amount was purely and wholly false and fictitious; that in truth and in fact, said mortgage had been executed by the corporation solely to secure the defendant against any liability which might arise out of his suretyship on certain undertakings of the corporation on an appeal to the Supreme Court of Oregon and that all liability on said undertakings had terminated before the transaction between plaintiff and defendant hereinbefore referred to; that said mortgage foreclosure proceedings whereby said defendant acquired the legal title to said corporate property and rendered valueless plaintiff's stock in said corporation were pursuant to and a part of the fraudulent scheme of said defendant to bring pressure to bear on plaintiff in order to protect her said investment and compel her to procure an

assignment from defendant of his alleged liens and claims against said corporation and of his interest therein as outlined in the exhibits filed herewith.

"That the plaintiff, so relying upon and believing in the truthfulness of the defendant's representations referred to, continued during the succeeding years upon said assumption, to shoulder and perform the burdens imposed by the defendant Phegley under said contract, Exhibit 'A,' and continued to incur the expenditures and make the disbursements necessary to preserve and protect the interest referred to in said contract; that nothing occurred to arouse the suspicions of the plaintiff as to the fraud so perpetrated upon her by the defendant until the present year at which time the plaintiff, in the course of investigation along other lines, came into possession of knowledge of circumstances, the further investigation of which led to the discovery of said fraud; that plaintiff promptly upon said discovery made demand upon the defendant for restitution; that some months of delay followed, during which time the matter was claimed by the defendant to be under the advisement of himself and his attorney, and that plaintiff within a reasonable time after the refusal of the defendant to restore her to the position in which she was before she was led into said agreement by the fraud of the defendant, instituted this suit."

It is further alleged that the existence and validity of the \$6,000 mortgage was the material and primary consideration for the agreement of plaintiff to purchase the interest of the defendant, all of which facts were known and used by him as a means of inveigling the plaintiff into the agreement of purchase, and that she would not have entered into that had she known the mortgage did not represent an actual *bona fide* existing debt of the corporation to the defendant.

After the foreclosure, the title to the property was lost to the mining company and that corporation was dissolved in 1908.

The agreement between the plaintiff and the defendant executed on June 11, 1907, recites that the defendant does sell, assign and transfer to the plaintiff a one-half interest in his mortgage and other claims against the company, and all his rights under the foreclosure decree, by which there was to be a sale of the property on June 15, 1907, in consideration of which the plaintiff was to pay the defendant one half of the amount of his claim, amounting in all to \$9,600. The agreement states that "they shall buy" and "share equally in purchasing said property"; that "whatever may be done by either of them in regard to the matters aforesaid, shall be for the mutual benefit of both of them, and that they shall be equally interested therein"; that the agreement is based upon the mutual trust of the parties and that neither of them shall dispose of any part of the property to a third party, without the written consent of the other, or without giving the other thirty days' option at the "same price at which he shall propose to sell."

Concurrent with the execution of the agreement, the plaintiff paid the defendant \$1,000 and gave him a 60-day note for \$3,800. On October 19, 1907, she purchased from the defendant his remaining half interest, paying therefor the further sum of \$4,800.

In his answer the defendant admits his ownership of the \$6,000 mortgage and the foreclosure decree rendered thereon, and that the plaintiff purchased and acquired all of his interest therein, but denies all other material allegations of the complaint. For a further and separate answer he alleges the execution of the written agreements; that he has fully performed all of their respective provisions; that by reason thereof the plaintiff entered upon and took possession of the property and should now be estopped from claiming that

the contracts were otherwise than as alleged and set forth in the complaint; that the plaintiff was a stockholder in the company; that she acquired and has never been disturbed in her possession of the property; that she has enjoyed such undisturbed possession for a period of nine years, during all of which time she made no effort to determine the validity of the mortgage, and that she is now and ought to be estopped from attacking the same in this suit.

In her reply the plaintiff denies all new matter in the answer. After the testimony was taken the trial court rendered a decree dismissing the complaint, and the plaintiff appeals. MODIFIED.

For appellant there was a brief submitted by *Mr. Wilson T. Hume*.

For respondent there was a brief prepared and submitted by *Mr. Ralph A. Coan* and *Mr. C. A. Shepard*.

JOHNS, J.—The law of this case was settled by Mr. Justice McCAMANT's opinion. Hence the validity of the \$6,000 mortgage and the relations existing between the plaintiff in regard to the mortgage are the only questions involved and they are questions of fact. The case was tried by the plaintiff in the lower court upon the theory that the \$6,000 mortgage was fictitious and void.

The defendant was not a stockholder in the mining company and apparently had no interest in it, yet for some reason not disclosed by the record he voluntarily offered to purchase the \$2,000 mortgage from the Grants Pass Banking & Trust Company, which was a prior lien upon the property, and he testified that he

told Dr. Cable, "If they have to have the cash I'll buy the note, if it is agreeable to you; I will write them to that effect," and the latter replied, "All right, go ahead and take it up." The defendant further testified that he then wrote the bank and within a few days the assignment was forwarded to a Portland bank. He says, "I paid them the \$2,000 plus the interest due on it and took it up," paying the bank the full amount of the \$2,000 mortgage with all accrued interest to the date of purchase.

5. The testimony that the \$6,000 mortgage was duly executed for a valuable consideration is clear and convincing. It appears that the execution of that note and mortgage was authorized at a meeting of the board of directors of the corporation called for that purpose, at which Dr. Cable, president, Milton Weidler, secretary, and all the other directors were present and agreed to its execution. At that meeting it was represented that Dr. Cable had advanced money to pay the bills of the company amounting to \$4,000; that there was due Mr. Cousins for his salary and money advanced by him \$2,700; that the company owed attorneys' fees and miscellaneous bills to the amount of \$1,250, making a total of about \$8,000, and that there was to be returned from the bond company \$2,000, leaving a net amount of \$6,000 due Cousins and Cable, all of which matters were fully explained and approved at the meeting of the directors.

It also appears that neither Cousins nor Cable desired to have the mortgage taken in his own name, and they suggested that it be executed in the name of the defendant as trustee for them according to their respective interests, and it was executed in the name of the defendant, while in fact the latter was the apparent owner and holder of the \$6,000 note and mort-

gage and held himself out to the plaintiff as such owner at the time of the execution of the contract between them, yet he held such note and mortgage as trustee only for Cousins and Cable and did not have any personal claim against the mining company for the amount represented thereby.

The purpose of the plaintiff, and the opinion of Mr. Justice McCAMANT so decides, was to acquire all the existing liens against the corporation, to protect her investment of more than \$15,000 in the stock of the corporation, and if the liens were valid it could not make any difference to her personally, who was the owner or holder of such claims.

But there is another element which as between the plaintiff and the defendant enters into and is a part of the consideration and purchase price of the \$6,000 note and mortgage. Phegley testified:

“Q. What was the amount of fees upon which you had agreed with these gentlemen that you were to receive for your services?

“A. They were to give me one third of the six thousand dollars.

“Q. Were you to get any part of the two thousand dollars?

“A. I owned the two thousand dollars; all of that.

“Q. The other two thousand?

“A. The trustee; no.

“Q. You were only to get one third of the six thousand dollars?

“A. That is all.”

After stating that the defendant's wife and her sister and two of her brothers had been her pupils and that “they were a lovely family of boys and girls that I thought a great deal of; and so when I found she was married to Mr. Phegley I at once had implicit con-

fidence in Mr. Phegley that I could rely upon him," the plaintiff testified:

"I talked over the matter with him and said I wanted to save my possession, and it resulted in me buying out the half of his interest for exactly dollar for dollar of what he himself had put into the property. * * At any rate I signed the contract for one half, for exactly one half of what he put in, cash advanced, nothing else.

"Q. Will you state whether or not there was to be any profit or loss on his part in the transaction?

"A. Not a cent. * *

"A. He gave me to understand that he had put in dollar for dollar for that in the property, money advanced by him in the property and he was actually entitled to it. * * He said he had put that much money into the property; every dollar of it. * *

"Q. Will you state whether or not you were suspicious of the statements made by Mr. Phegley at the time of this transaction?

"A. I had no suspicions whatever.

"Q. Will you state to the court whether or not this consideration would have been paid or contract entered into by you at the time had you known that this six thousand dollar mortgage was a mortgage given to secure the president and manager of that corporation for alleged past indebtedness due them?

"A. I never would; I wouldn't have entered into it."

Regarding her contract with the defendant, she further testified:

"I was to take over one half of Mr. Phegley's interest, dollar for dollar, for what he had put in; I would make good to him for one half and not a dollar more.

"Q. Didn't you and Mr. Phegley agree before this meeting you were to buy half of this nine thousand six hundred dollars?

"A. No, sir; it was half of what he put into the property.

"Q. You had not agreed with Mr. Phegley how much you were to pay for this property?

"A. I repeated that I agreed, over and over, I agreed to pay him dollar for dollar for what he put into it."

Although the defendant denies that he ever represented to the plaintiff that he had "paid out or expended on this property that \$6,000 claim," he does not dispute her testimony that she was "buying out the one half of his interest for exactly dollar for dollar, all of what he himself had put into the property," and the fact remains that the original contract between them, dated June 11, 1907, was prepared and executed on the representation that the defendant was the owner and holder of the \$6,000 note and mortgage in his own right and name, and the plaintiff never knew or was advised that the defendant held the mortgage as trustee for Cousins and Cable until he testified as a witness in this case.

Referring to the \$6,000 note and mortgage, he testified that he was to receive one third of that amount, or \$2,000; for his services as trustee for Cousins and Cable, who were the real owners, and that important fact was concealed from the plaintiff, who paid the full face value of both mortgages and accrued interest and other moneys advanced, making a total of \$9,600.

While the record shows that the full amount of the \$6,000 mortgage was a just and valid debt and lien against the corporation, the fact that the defendant was to receive \$2,000 out of the principal for his services as trustee of that mortgage is sufficient to arouse at least a suspicion of the good faith of the whole

transaction. Legitimate business is not done on any such basis.

It further appears that when the plaintiff paid the agreed purchase price to the defendant the latter took the trustee money of Cousins and Cable, which he received from her, and purchased stock for them in another mining corporation of which he was the moving spirit.

6. On the record, we are of the opinion that the defendant held the \$6,000 note and mortgage as trustee for the use and benefit of Cousins and Cable only; that they were executed for a valuable consideration and constituted a valid and subsisting lien on the property of the mining company at the time of purchase by the plaintiff. The agreement by which the plaintiff purchased the \$6,000 note and mortgage included and carried with it the agreement that she was to pay "dollar for dollar all of what he himself had put into the property." That was one of the considerations for, and which entered into, the purchase. It is very apparent that the defendant misled and deceived the plaintiff and concealed from her the fact that he was to have and did receive a fee of \$2,000 out of the \$6,000 note and mortgage, for his services as trustee for Cousins and Cable, and that the plaintiff relied upon the statements of the defendant as to the amount of his investment. We hold that in equity and good conscience the defendant should be required to pay over to the plaintiff the \$2,000.

7, 8. This is a suit in equity and is tried *de novo* in this court. The decree of the Circuit Court will be modified and one entered here in favor of the plaintiff against the defendant for \$2,000, with costs in this and the Circuit Court.

MODIFIED.

BURNETT, J. (Dissenting).—This suit was before this court on an appeal by the plaintiff from a decree of the Circuit Court sustaining a demurrer to the third amended complaint and dismissing the suit. In an opinion reported in 84 Or. 124 (163 Pac. 1166), the decree of the Circuit Court was reversed with instructions to overrule the demurrer. This having been done, the defendant answered, the plaintiff replied and the court heard the testimony of the parties and entered a decree dismissing the plaintiff's suit with costs. She again appealed.

In addition to the statement in the former opinion, it is proper to say that we glean from the pleadings and evidence that the Galice Consolidated Mines Company, hereinafter called the company for the sake of brevity, was an Oregon corporation owning mining property in Southern Oregon, and the plaintiff had invested in its stock a sum of money in excess of \$15,000. It was indebted to a banking concern at Grants Pass for borrowed money in the sum of \$2,000 and interest, for which the company had given its note and mortgage upon the property, and this constituted the first lien on its holding. The defendant Phegley had purchased this note and mortgage, paying therefor its face and the accrued interest. This appears from undisputed testimony.

One Anderson and his associates had recovered two judgments against the company, one for \$2,500 and another for \$2,600, which constituted liens second only to the \$2,000 mortgage already mentioned. The defendant had a \$6,000 mortgage on the property, subsequent and inferior to the judgment liens already mentioned. In a suit to foreclose, making the judgment lienholders defendants, he had obtained a decree fore-

closing his mortgages, had issued, execution and the day of sale was appointed for June 15, 1907. About this time, the plaintiff, in order to obtain control of the property with a view of protecting the investment she had already made, approached the defendant, whom she met for the first time according to her testimony, and proposed to purchase his claims against the company. She testifies that she was told of the mortgage by a broker with whom she had had some dealings, and in consequence of this information she felt it necessary to act at once in order to obtain control of the property. Previous to this, Phegley had entered into a contract with Anderson, the substance of which was that the property should be sold either by virtue of the Anderson judgments or foreclosure of the mortgages held by Phegley, and should be bought in by one or the other as they might choose, and the property pooled with mining ground held by Anderson and his associates, the assessment work kept up so as to maintain title, and finally all the properties should be sold together for the minimum price of \$26,000, of which Anderson and associates should receive \$16,000 and Phegley \$10,000, any excess over the minimum upset price to be divided equally between Phegley on the one hand and Anderson on the other. Anderson was appointed by the pooling agreement to represent all parties in the supervision of the necessary assessment work and maintenance of the property and was to receive \$40 per month for his services.

As stated, Phegley had foreclosed his mortgages and obtained a decree and order of sale, at which juncture the plaintiff opened negotiations with him for the purchase. As a result of these negotiations she had her attorney prepare for her what is known as exhibit "B," attached to her complaint, it being a

contract between the plaintiff as party of the first part and the defendant here as party of the second part, whereby under date of June 11, 1907, they agreed as follows:

"That in consideration of the promises of said party of the first part hereinafter set forth, the said party of the second part does hereby sell, assign, transfer and set over unto said party of the first part a half interest in and to the mortgage and other claims belonging to him against the Galice Consolidated Mining Company and of his rights under a certain decree entered in his favor in the circuit court of Oregon for Josephine County in a case where he is plaintiff and the Galice Consolidated Mining Company and others were defendants, under which decree there is to be a sale of the property of said Galice Consolidated Mining Company on June 15, 1907.

"In consideration of the foregoing, the said party of the first part does hereby agree to pay to said party of the second part one half of the amount of his claim against said company at the present time, including one half the money expended by him in the care of said property, amounting in all to ninety-six hundred dollars."

The remainder of the agreement recites in substance that they should share equally in purchasing the property at the coming sale and neither should dispose of the undivided interest thus obtained, without giving the other an option of thirty days to purchase the same. The plaintiff also bound herself by exhibit "B" to the performance of half of Phegley's obligation under the pooling agreement.

Afterwards, on October 19, 1907, they entered into the agreement called exhibit "C," attached to the complaint, narrating the foreclosure of the mortgage and the judgment liens of Anderson; that Phegley had purchased the property of the company by virtue

of the sale and confirmation thereof and the consequent sheriff's deed, and that he had assigned to plaintiff a half interest, and later the remaining half, and declaring finally:

"Now, therefore, this is to certify that the said Grant Phegley now holds the naked legal title to the properties so purchased by him at such sale, in trust for the said Anderson, Williamson and Phillips of the one part and said Emma G. Robinson of the other part, whatever the said several interests may be, and without any beneficial interest of his own in and to said property or any part thereof."

The complaint here was amended by interlineations on its return to the Circuit Court at the time of trial, so as to attack not only the mortgage for \$6,000 but also the one for \$2,000, on the ground that the latter encumbrance represented a false and fraudulent claim and that in fact no part thereof was due and owing to Phegley from the corporation at any time. The complaint is to the effect that the existence and validity of the \$6,000 indebtedness and the liability of the corporation for the further sum of \$2,000 were material and prime considerations on the part of the plaintiff, inducing her to "purchase the interests of the defendant, in that the same constituted, if the averments of the defendant were true, a valid and existing lien upon and thereafter a title to the corporate property, the control of which lien and title was necessary for the protection of the plaintiff's interest in said corporation." She says in effect that on the contrary neither of these claims had any validity and neither of them represented any actual indebtedness against the corporation. She claims that the foreclosures were collusive. She says she has no plain, speedy or adequate remedy at law, offers to return to the de-

fendant all of the choses in action, property and rights transferred to her by the agreements, exhibits "B" and "C," and prays that the agreements be canceled and that she have judgment against the defendant for \$34,345.43, which presumably is the amount of the various sums of money she has expended in the venture, although it cannot be computed at that figure from the abstract before us.

The answer admits the making of the agreements, traverses all allegations of fraud and misrepresentation and denies the charge that the mortgages mentioned were not valid claims against the company. Affirmatively, the defendant avows making the contracts alluded to and that by virtue thereof the plaintiff entered into possession of the property and has retained the same and the beneficial use thereof up to the present time. Other questions are raised by the affirmative matter in the answer which are deemed unnecessary for consideration.

The crux of the controversy is whether or not the two mortgages in question for \$2,000 of money originally borrowed from the bank, and the \$6,000 included in the mortgage given directly to the defendant, were valid claims against the company. The plaintiff gave no evidence whatever to support her averment of the invalidity of the \$2,000 mortgage. On the contrary, the defendant testifies that the bank was pressing the company for its money which it had loaned and that at that time he bought the note and mortgage from the banking concern for its full face value, including the accrued interest. There is nothing whatever in the testimony to dispute this assertion of the defendant and hence the attack on the plaintiff must fail as to the \$2,000 mortgage. She says in her complaint concerning the \$6,000 mortgage that it was

given to indemnify the defendant against liability which might befall him by virtue of an undertaking which he had signed for the company on an appeal from the judgments rendered against it in favor of Anderson, but that the appeal having been dismissed, that mortgage had served its purpose and thereafter was of no effect, notwithstanding which the defendant had sold it to her, together with the decree for its foreclosure. There is no evidence whatever in the record tending in the least to sustain the plaintiff's allegation in this respect, although it was denied by the defendant. On the contrary, the latter proved by the testimony of the secretary of the corporation that the company was indebted to its president for money advanced for the expenses of the corporation, and to its then secretary for his salary, which were actual, *bona fide* claims, and that there were other demands against the company, swelling the total to about \$8,000; that the sum of \$2,000 returned from a surety company which had taken that deposit as indemnity against liability, was deducted from the total liability of \$8,000, leaving a balance of \$6,000 of actual indebtedness of the company, which was embodied in the mortgage for that amount of money. The defendant explains that it was taken in his name at the instance of the president and the secretary of the company, neither of whom desired to have precedence over the other in his demand against the company, hence at their request he took and held it in trust for them as their interest might appear. He testified as the first witness for the plaintiff, who thereby having called him to testify, vouched for his credibility. He says that for his services he was to have as his compensation one third of the proceeds of the mortgage. He explains that when the property was sold on foreclosure he invested the

proceeds of the \$6,000 mortgage in stock in another mining company at the direction of the beneficiaries.

It is well to attend to the terms of the agreement which the plaintiff had her attorney prepare. It is said there:

“That in consideration of the promises of said party of the first part [the plaintiff here] hereinafter set forth, the said party of the second part does hereby sell, assign, transfer and set over unto said party of the first part a half interest in and to the mortgage and other claims belonging to him against the Galice Consolidated Mining Company and of his rights under a certain decree entered in his favor, * * under which decree there is to be a sale of the property of said * * company on June 15, 1907.”

On her part, she promised to pay not only one half the amount of his claim against the company thus recited and evidenced, but also one half of the money expended by him in care of the property, amounting in all to \$9,600. She agreed to do those two things: First, to take up half the decree, and second, reimburse the defendant for half he had otherwise expended.

In a sense, these are mutual contractual considerations. They are the language of the plaintiff herself, speaking through her own attorney who prepared the contract. She knew what she was signing and she knew what she was contracting to do and what the defendant agreed to perform. As said in *Sutherlin v. Bloomer*, 50 Or. 398, 407 (93 Pac. 135, 139):

“The consideration specified in the written contract consists of certain acts to be performed, and the authorities are practically unanimous in holding that, where the statement in the written instrument as to the consideration is of a contractual nature, as where the consideration consists of a specific and direct

promise by one of the parties to perform certain acts, it cannot be changed or modified by parol or extrinsic evidence. A party has a right to make the consideration of his agreement of the essence of the contract, and, when this is done, the consideration for the contract, with reference to its conclusiveness, must stand on the same footing as its other provisions, and accordingly cannot be affected by the introduction of parol or extrinsic evidence: (Citing authorities.)”

The plaintiff's object, stated by herself, was to obtain control of the property through the sale of the same under the decree of foreclosure, which sale was then near at hand. The decree was a valid one. With the purpose she had in view it could make no difference to her whether the \$6,000 mortgage was held by Phegley as trustee or in his own right. Such a representation, even if untrue, would be immaterial under the circumstances and would not be any basis upon which to charge fraud. The undisputed testimony shows that it was given by order of the directors upon a thorough investigation of the claim upon which it was based, which was for money advanced to the company and for salary to its secretary. Neither can it make any difference to her what disposition was to be made of the proceeds of the sale under the decree, or what compensation the beneficiaries for whom the mortgage was held should give to the defendant for his services. Taking for true all that Phegley said about holding the \$6,000 mortgage for the benefit of those to whom the money was due, yet the decree was valid because Section 29, L. O. L., says:

“An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for

the benefit of another is a trustee of an express trust within the meaning of this section."

Although Phegley held this mortgage in trust for other parties to whom the indebtedness was actually due, and although they were to compensate him for his services, all of which is undisputed, the claim upon which the mortgage was based, the mortgage itself and the decree entered in pursuance thereof constituted a valid claim against the company and a lien upon its property. Its ownership gave her the control she desired. The plaintiff herself says that she sought Phegley; not he, her. She said she had never met him before and had never even known his name until she "learned he had foreclosed this mortgage." She further says:

"So then I talked over the matter with him and said I wanted to save my possession, and it resulted in me buying out the half of his interest for exactly dollar for dollar of what he himself had put into the property.

"Q. How was the amount arrived at?

"A. We counted up the first mortgage and interest on that and the second mortgage and interest on that and what he claimed he had spent on the property, and attorney's fees and expenses in going over the property and different times down to Grants Pass and everything dollar for dollar of what he had expended up to that time on the property and I was to pay that; it amounted at that time to nine thousand, six hundred and three dollars, and when I took over the one half I paid him cash difference, the one dollar and a half so as to make it a round number."

On cross-examination she testified as follows:

"Q. Just when you made the deal, just what did Mr. Phegley say to you regarding the claim he had?

"A. I could not repeat his words eleven years after. I am under oath. I know the impression I got from him.

"Q. I don't care about the impression.

"A. I could not repeat his words. He said he had advanced so much. He used words so that I fully understood that he had advanced that money,—put that much money right over into the property.

"Q. Did he use the word 'advanced'?

"A. I could not swear to that.

"Q. Did he use the word 'pay'?

"A. I could not swear to the exact words he used.

"Q. All you are testifying to is the impression that he left with you?

"A. I am testifying to the exact understanding his words gave me, but whether he used this word or that word I couldn't say. I know I talked with him that I wanted to save my stock in that property and must do so.

"Q. And you wanted to get these mortgages so you could save it?

"A. Yes, sir; that was the only way open to me, was to buy a half interest with him."

The ground of her attack upon the \$6,000 mortgage, as stated before, is to the effect that it was given solely to secure the defendant against any liability which might arise out of his suretyship on the appeal undertakings which he had signed for the company in appeals which had long since terminated, thus destroying any possibility of his being held upon the undertakings. But, as stated, she produced no syllable of testimony on that subject. The validity of the mortgage is beyond dispute and it was an actual, *bona fide* indebtedness of the company. It is a mere quibble to say that because Phegley held it as trustee, claiming also an interest in the proceeds as compensation, the claim was not a valid one for which the property was liable. Phegley was entitled to collect every cent of the claim, because he had a valid decree for it which the plaintiff has utterly failed to impeach in any sense of the word.

She has sought by this suit, not to recover damages for the fraud she claims to have been practiced upon her, but to rescind the contract on account of the alleged deceit and to secure a restoration to her of all that she parted with in consequence of having made the agreement. She might have elected to sue for damages. She did not, but chose rather to sue in equity for a rescission. But, whichever horn of the dilemma she adopts, and whether this is to be treated as a suit to rescind or as an action for damages, she has utterly failed to prove any of the allegations of her complaint respecting the fraud charged.

While testifying as a witness for the plaintiff, after stating that he was a trustee for parties who had advanced the \$6,000 to pay the debt of the company, Phegley was asked this question by her counsel:

“Was that fact communicated by you to Miss Robinson at the time of your negotiations with her, as a result of which the contract admitted in the pleadings was executed?”

—and replied:

“I may have told Miss Robinson that I was holding the \$6,000 mortgage for other parties, but the \$2,000 mortgage I owned myself.”

In brief, under the circumstances disclosed by the evidence it is immaterial whether Phegley held this \$6,000 mortgage and the decree in pursuance thereof; entirely in his own right or wholly in the right of another or partly in his own right and partly in that of others. It was still a valid lien upon the property which the plaintiff sought to obtain so as to control the holdings of the company. Having prepared the agreement herself by her own attorney after a full explanation and computation of the several amounts due, she certainly cannot claim that she was defrauded.

She has wholly failed to establish a solitary controverted allegation of her complaint. She may have paid too dearly for her stock in the first instance, but she did not buy that from Phegley, nor was he known to her at that time. The corporation may have suffered in its litigation resulting in the two judgments against it, but Phegley is not shown to have influenced that matter. Moreover, no question is raised about them in this suit. The essence of the present contention is that she insists the mortgage was fraudulent, whereas it is plainly demonstrated that it was a just and valid claim against the concern. In the present juncture she has no cause of complaint, for she has utterly failed to prove her allegations. Very likely she made an unprofitable investment like many another, possessed by a craving for sudden wealth, who has put money into mining ventures without experience in the business or knowledge of the property; but that is no reason why we should amerce Phegley for her benefit. The decree rendered by the judge who heard the testimony and saw the witnesses should be affirmed.

MODIFIED. REHEARING DENIED.

Argued July 2, affirmed September 9, 1919.

ROBERTSON v. MARTIN.*

(183 Pac. 651.)

Public Lands—When Evidence Insufficient to Authorize Correction of Survey.

1. Evidence to show a mistake in a United States survey, which has been acted on and upheld by its Land Department and is presumed to be correct, *held* not of the clear and cogent character necessary to

*On conclusiveness of decisions or findings of the Land Department as to survey, see note in L. R. A. 1918D, 597, 633. REPORTER.

authorize the court to correct it, and overthrow the credit due it as established by the field-notes.

Vendor and Purchaser—When Evidence Shows Sale in Gross.

2. Trade, for a house and \$2,000, of a farm represented in the conveyance as 24.75 acres, according to government survey, "be the same more or less," held in gross, and not by the acre.

Vendor and Purchaser—When Evidence Shows No Fraudulent Representations.

3. Evidence held to sustain finding that there was no fraudulent representation in the trade of a farm.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2.

This is an appeal by defendants Annie Maude Martin and E. F. Martin from a decree foreclosing a mortgage given by them to Marilla S. Smith on January 21, 1914. The complaint is in the usual form. It is alleged that on or about the twenty-third day of March, 1915, the said Marilla S. Smith, for a valuable consideration, indorsed and delivered said promissory note to the plaintiff, and at the time assigned the mortgage to plaintiff.

The answer admits the execution of the note, the giving of the mortgage, the recording of the same, and that it was given to secure the note; that the note had not been paid; that the Eugene Loan & Savings Bank, a codefendant, had a second mortgage on the premises, and that no proceedings had been had at law or otherwise for the collection of the said amount; then denies generally all of the other allegations of the complaint. It is then alleged in the answer that the note and mortgage were by the said Marilla S. Smith assigned to the respondent on the twenty-third day of March, 1915; that the respondent herein is a daughter of the said Smith and took said note and mortgage without consideration and with full knowledge of the equities existing between the appellants and the said Smith. It

is then alleged that defendants, the Martins, in November and December, 1913, were residents of San Diego, California, and were the owners of certain residence property in said city together with household furniture therein, and that they advertised the same for sale or trade, and that the said Marilla S. Smith, acting through her husband and agent E. C. Smith, entered into negotiations for the exchange of the property described in the complaint for the San Diego property of the appellants and in order to induce these defendants to make such trade represented to them that the property described in the complaint contained twenty-five acres of land, that twenty acres thereof were in a high state of cultivation and that five acres of the same were timbered land of a lighter soil and gravel-bar; that the county road ran east and west on the south side of said premises to near the west line thereof; that all of the timbered land, gravel-bar or rocky places were in the little five-acre corner lying south of the road; that the balance of the premises, twenty acres, was all in a high state of cultivation and river bottom land and worth the sum of \$350 per acre, or \$8,750. It is alleged that these appellants had never seen the premises, which was well known to the said Smith; that all of said statements and representations were positive statements of facts and were made for the purpose of inducing the defendant Martins to purchase said property and were made by the said Smith recklessly and as of his own knowledge and without any regard for the truthfulness of the same, without knowing whether they were true or false, and with the intent that they should be relied upon and acted upon by the appellants; that the Martins relying upon said statements consummated the trade upon the basis of \$350 per acre, aggregating

\$8,750 and conveyed the California property to Smith and executed the mortgage of \$2,000 set out in the complaint in part payment for the premises. It is further alleged that there were but 20.55 acres in said premises; that there were 6.5 acres of the gravel-bar unfit for cultivation, and not to exceed twelve acres of the land in cultivation; that the premises were not worth to exceed \$6,550; that if they had been as represented they would have been worth \$8,750; that by reason of the misrepresentations appellants were induced to execute a mortgage and to pay \$2,100 more than the premises were worth. That in addition thereto they had paid interest on the mortgage amounting to \$148 and sought to recoup against the said mortgage the amount of \$2,248. It is also alleged as a separate defense that the note and mortgage in suit were transferred to the plaintiff as security for a loan of \$1,000; that in any event the plaintiff had only an interest in the note to the extent of that amount.

The reply put in issue all of the affirmative allegations of the answer, and averred that the appellants pursued their own investigation of the tracts of land in Lane County, and caused the premises to be examined and relied absolutely and entirely upon their own investigation and examination of the premises; that the defendants traded for the premises as a whole and not by the acre; that there was no purchase price fixed or determined with reference to the different kinds of land constituting the premises, nor the number of acres thereof; that said E. C. Smith never knew the exact amount of bottom land or land in a high state of cultivation on the premises or the exact number of acres contained therein; that any statements made as to the amount of the land were made in good faith by the said E. C. Smith, and believed by him to be true.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. O. H. Foster*.

For respondent there was a brief over the names of *Mr. Charles A. Hardy* and *Messrs. Smith & Bryson*, with an oral argument by *Mr. Hardy*.

BEAN, J.—Upon the trial, it was shown that the appellants and the Smiths at the time of the execution of the note and mortgage were residents of San Diego, California; that the Martins owned the residence property and household furniture which they advertised for sale. The advertisement was answered by a letter from E. C. Smith, the agent of Marilla S. Smith, wherein it was stated:

“I have a very choice little farm of 25 acres of river bottom land on the Willamette River. * * 20 acres are in a high state of cultivation, producing immense crops * * the other five is timber which is valuable.”

Pursuant to this letter, the parties met in San Diego and Smith produced a sketch or map of the land marked “all choice land, 20 acres; timber, five acres.” During the trade Mr. Smith said, “to be exact there are 24.75 acres” in the tract. The parties made an exchange of their respective properties, and the Martin’s executed a mortgage in favor of Mrs. Smith for the sum of \$2,000. Appellants procured a survey of the land in March after they had established their residence thereon in the preceding September, according to such survey and measurement made by the defendant Martin, with the assistance of a neighbor they computed the number of acres in the entire tract to be 20.55 acres or 4.20 acres short. They also claimed that there were but 13.52 acres of land in cultivation. The trial court found that there was no competent

evidence showing that there was a shortage in the acreage, and that the evidence did not establish that there were false or fraudulent representations as to acreage made by E. C. Smith, but that all the statements made by the said E. C. Smith were in good faith according to the information which he had concerning the same based upon the abstract of title showing the government survey of the land, and upon the information given to him by the grantors who sold said tract of land to Mrs. Smith; that the value of the land is \$350 per acre.

The allegations of fraudulent representation made by E. C. Smith, the husband and agent of defendants' grantor, in the exchange of the real properties are not sustained by the evidence. The area of the land traded to defendant, the Martins, by the Smiths consisted of 24.75 acres according to the government survey, "be the same more or less," thereof, and plats. It was so represented in the deed of conveyance from the Smiths to the Martins. Also in several conveyances shown in the abstract of title furnished by the Smiths to the Martins at the time of the exchange. There is no competent evidence that the government survey was incorrect. The deputy county surveyor surveyed the 31.64 acre tract. He did not furnish any field-notes of his survey nor state in what manner the survey was made. His conclusion was based upon the assumption that the 6.89 acre tract, which had been sold off from the larger lot, was correct. He figured the number of acres sold to defendant from a measurement made by defendant Martin and another, neither of whom were surveyors, and made the number of acres of the cultivated land 13.11 acres instead of 20 acres as defendants claim Smith represented. In doing this the deputy surveyor assumed that the lay-

men who made the measurements had made a correct plat of the tract with the proper angles.

1. The testimony is not convincing or sufficient to overcome the government survey and field-notes. The burden of proof is upon the appellants. United States government surveys are presumed to be correct. Before courts will correct such surveys that have been acted upon and upheld by the United States Land Department, and overthrow the credit due them as established by the field-notes, a mistake therein must be shown by clear and cogent testimony: *Blair et al. v. Brown*, 17 Wash. 570 (50 Pac. 483); *Whitaker v. McBride*, 197 U. S. 510 (25 Sup. Ct. Rep. 530, 49 L. Ed. 857); *Kneeland v. Korter*, 40 Wash. 359 (82 Pac. 608, 1 L. R. A. (N. S.) 745).

2. Before making the exchange, the defendant Martin wrote to a banker at Eugene in regard to the value of the Oregon property and was urged by Smith to come to Oregon, and make an investigation himself. After the respective conveyances were made, the appellants came to Lane County, examined and moved on to the land, and wrote Smith that they were satisfied with the farm. The trade of the Oregon farm to defendant Martin was made in gross and not by the acre: *Ogilvie v. Stackland*, 92 Or. 352 (179 Pac. 669).

3. After a careful reading of the testimony in the case, we approve the finding of the trial court to the effect that the complaint of fraud had not been sustained by the evidence.

The decree of the lower court is therefore affirmed.

AFFIRMED.

MCBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Submitted on brief September 2, affirmed September 9, 1919.

STATE v. MARCO.

(183 Pac. 653.)

Fish—When Evidence Sustains Conviction of Using Purse-nets Unlawfully.

1. Where parties convicted of violating Laws of 1917, page 403, Section 2, stipulated that, in purse-net fishing, removing the net from the water and emptying it of the catch of fish is a necessary part of the fishing operation, one permitting his seine to drift with the tide across the dead-line into the forbidden territory, and there causing same to be lifted from the water to the vessel, is guilty of violation of such statute, although the fish entered the seine outside of the forbidden territory and the seine was closed before drifting across the line.

BENNETT, J., Dissenting.

From Clatsop: JAMES A. EAKIN, Judge.

In Banc.

The defendant is charged with having violated the provisions of Section 2 of Chapter 207 of the Laws of 1917, by fishing for salmon, with a purse-net, in a portion of the Columbia River, in which such fishing is prohibited by the act mentioned. Upon the trial in the lower court, the facts in the case were stipulated as follows:

“There being no disagreement between the parties to this action as to the actual facts pertaining to the matter, for the purpose of setting the same out in writing so that there will be no misunderstanding thereto, it is hereby stipulated and agreed between the parties that the following constitutes the actual facts in the case:

“That said defendant was the owner and operator of a purse seine, under a duly and regularly issued purse seine license of the State of Oregon; that on the day complained of in the complaint, he was operating said purse seine westerly on that certain line described in Chapter 207 of the Laws of 1917, and was fishing for salmon, by means of a device known as a

purse seine; that in such operation he laid out his purse seine westerly of said line in the Columbia River and the action of the tide carried the said purse seine into the Columbia River in an easterly direction, and east of that said certain line hereinbefore mentioned; that just before reaching said certain line, he caused the purse seine to be brailed, meaning thereby that the net was pursed or drawn in such a manner that no fish could then be entrapped in the said purse seine; that after such brailing or enclosing process, he allowed the net with the fish caught west of said line to be carried by the action of the tide east of that certain line in waters of the Columbia River and after the net arrived at a point about one hundred yards easterly of that certain line, he caused the net to be taken from the water and then onto the deck of the purse seine vessel and the fish removed from the net onto the deck of said purse seine vessel.

"It being stipulated that the fish were actually caught before the net was pursed or enclosed, and westerly of the line mentioned.

"It is further stipulated that in purse seine fishing, the act of removing the net from the water and emptying the same of the catch of fish is a necessary part of the fishing operation.

"It is further stipulated that it was impossible in this case to catch any fish in the net after it arrived at the said designated line by reason of the fact that the said net had been brailed, as mentioned. It is further stipulated that this action shall be tried by the court without a jury."

A judgment of conviction followed, from which the defendant appeals.

AFFIRMED.

For appellant there was a brief submitted over the name of *Messrs. Norblad & Hesse*.

For the State there was a brief prepared and submitted by *Mr. Jasper J. Barrett*, District Attorney.

BENSON, J.—1. The sole question submitted for our consideration, by this appeal, is this: Do the stipulated facts constitute a violation of the provisions of the act of 1917? This law is as follows:

“It shall be unlawful for any person or * * corporation, to fish for salmon, sturgeon or other anadromous fish by means of devices known as purse seines in any of the waters of the Columbia River in the State of Oregon or over which the State of Oregon has concurrent jurisdiction, east of a certain line which shall be drawn from the present inshore end of the north jetty on the Columbia River to the knuckle of the south jetty on said river, which knuckle is approximately four miles westerly from the Government dock at Fort Stevens. Said line will pass approximately three eighths ($\frac{3}{8}$) of a mile westerly from Buoy No. 10, as shown on the Coast Geodetic Survey Chart No. 6151, dated Jan. 5th, 1917.”

Was the defendant *fishing* in forbidden waters, when he permitted his seine to drift with the tide across the dead-line, into the forbidden territory, where he caused the seine to be lifted from the water to the deck of his vessel? The defendant urges that since the seine was brailed or pursed, so that no fish could thereafter be entrapped in the net, before it was carried over the line, and so remained until it was finally lifted into the boat, it cannot be said that he has violated the law by fishing east of the line.

With the assistance of able and industrious counsel, representing both plaintiff and defendant, we have succeeded in discovering but one authority which throws any light upon the problem thus presented, and that is the case of the *Ship Frederick Gerring Jr. v. The Queen*, 27 Canada Supreme Court Reports, 271. In this case, an American fishing schooner had been fishing at a point more than three marine miles from

the coast of Nova Scotia, and after the seine was pursed up and secured to the schooner, and while the crew were engaged in the act of baling the fish out of the seine with a long-handled dip-net, the vessel drifted to a point within a mile and a half of the coast, where she was seized by the authorities, and condemnation proceedings followed, for a violation of the treaty between the United States and Great Britain, and of certain English statutes. By the convention of 1818, the United States renounced forever,

“Any liberty heretofore enjoyed to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His said (Brittanic) Majesty’s Dominions in America.”

In harmony with this treaty, it was enacted by the Canadian parliament, that,

“If a foreign ship (unlicensed) has been found fishing or preparing to fish, or to have been fishing in British waters within three marine miles, etc., she shall be forfeited.”

There, as here then, the question was: Was she “fishing” at the time of the seizure? The opinion of the court, which is quite extended and elaborate, contains the following:

“The act of fishing is a pursuit consisting, not of a single but of many acts according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession. That, at least, is the idea of what ‘fishing,’ according to the ordinary acceptation of the word, means, and that, I think, is the meaning which we must give to the words in the statutes and treaty.

There is here, as I conceive, no need for interpretation, and the fundamental canon is: 'Do not interpret where there is no need of interpretation.' If when the S. S. 'Aberdeen,' moving eastward saw the 'Gerring,' a mile and three-quarters from shore, engaged as I have described, some of her crew baling fish from the water, others assisting to confine the fish into smaller and smaller compass, so as to be more easily secured; others driving the fish within the ambit of the dip net by splashing with their oars in the water; others sorting and dressing and otherwise treating the fish, the question were asked: 'What is the vessel doing?' Would not the inevitable answer be: 'She is fishing?' and if any one on board could be found bold enough to affirm that she was not 'fishing,' that that operation was completed hours before, when the seine was pursed up and the mackerel therein enclosed, would he not be set down as either ignorant of language or as bereft of reason?

"Even if the question depended upon the 'taking' of the fish, I do not understand that fish are 'taken' when they are enclosed in a seine, or encompassed about by it. They are still alive in their native element, possibly with few but still with some chances of escape. As I understand, they are never all taken; numbers escape. There is the contingency of the seine breaking, or the fish falling from the dip net between the seine and vessel, or of a storm arising and the vessel breaking away from the seine altogether. And there are, doubtless, many other chances of escape. The 'fishing' is not over—although there may be a moral certainty that the fish will eventually be secured—until as a fact they are secured."

In addition to the persuasive argument which we have just quoted, we are impressed with the fact that fishing with purse-seines is looked upon with disfavor by legislators, and the act upon which the prosecution herein is based is in the nature of a police regulation of a type of fishing which calls for restraint. This is

indicated by the fact that the act of 1917 was amended by Chapter 269, Laws of 1919, so as to make it unlawful, within the specified area, "to have any devices known as purse-seines, whether fishing or not, in any of the waters of the Columbia River in the State of Oregon or over which the State of Oregon has concurrent jurisdiction, etc." The opinion from which we have already quoted, speaks of fishing with purse-seines as—

"a business that, according to present light, and present scientific knowledge, may be characterized as nefarious, a business, the tendency of which is to annihilate for all time the fish-food supply of this continent, a business, too, which, so far as Canadian waters are concerned, has been prohibited and criminalized."

It appears to us quite conclusive that, since the parties hereto have stipulated that "in purse-seine fishing, the act of removing the net from the water and emptying the same of the catch of fish is a necessary part of the fishing operation," it is not our province to determine what particular steps in the fishing are intended to be prohibited by legislative enactment.

The defendant was "fishing" in forbidden waters and the judgment must be affirmed. **AFFIRMED.**

BENNETT, J., dissents.

Argued July 16, affirmed September 9, 1919.

ROSEBURG NAT. BANK v. CAMP.

(183 Pac. 655.)

Appeal and Error—Without Objection to Confirmation of Sale Jurisdictional Questions Only Reviewable.

1. Where no application to set aside the order of confirmation of sale of real property was made, and there was no attempt to call the lower court's attention to want of service on defendants of motion to confirm as violating the court rules, and there being no action in the lower court raising and reserving this or other questions, the review is limited to jurisdictional questions and sufficiency of pleadings.

Execution—Service of Motion to Confirm Sale Unnecessary.

2. Section 241, subdivision 2, L. O. L., as amended by Laws of 1917, page 64, requires the court to allow the order confirming sale, unless upon hearing it satisfactorily appears that the sale proceedings were substantially irregular to the probable injury of the objector, and service upon the judgment debtors of a motion to confirm is not required by statute, and, where they had knowledge of the final decree directing sale, they cannot be heard to complain of not being served.

Execution—Notice to Confirm Sale of Land Subject to Rule of Court.

3. A court, granting an order of confirmation of sale of real property, may construe its own rules as to requiring service of motion to confirm sale of real property upon the judgment debtor.

From Douglas: GEORGE F. SKIPWORTH, Judge.

Department 2.

This is an appeal by defendants from an order of confirmation of sale of real property. A resale of the property was directed by this court upon a former appeal of the cause: See *Roseburg Nat. Bank v. Camp*, 89 Or. 67 (173 Pac. 313). After entering the mandate of this court, the trial court ordered that upon application of the plaintiff an *alias* execution issue upon the decree of foreclosure for a resale of the property.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Albert Abraham*.

For respondent there was a brief and an oral argument by *Mr. Benjamin L. Eddy*.

BEAN, J.—1. The assignments of error specify that the court erred in hearing the motion for confirmation, and entering the order of confirmation without notice to defendants as required by the rules of the trial court. Section 241, L. O. L., as amended by General Laws of Oregon, 1917, page 64, entitles the plaintiff in the writ of execution, on motion therefor, to have an order confirming the sale, unless the judgment debtor, or in case of his death his representatives, shall file with the clerk, within ten days after the return of the execution, his objections thereto. The record discloses no objection to the confirmation of sale. No illegal procedure in making the sale has been pointed out. No application was made to the trial court to set aside the order of confirmation nor any attempt made to call the attention of that court to any irregularity in the sale or want of service of the motion, so as to obtain any ruling in regard thereto. In the absence of some action in the lower court, raising and reserving other questions, review, upon appeal, is limited to jurisdictional questions, and the sufficiency of the allegations of the pleadings: *Marks v. First Nat. Bank*, 84 Or. 601 (145 Pac. 673).

2, 3. Even if objection to the confirmation of sale had been filed on behalf of defendants, the mandate of subdivision 2, Section 241, requires the court to allow the order confirming the sale, unless upon the hearing it satisfactorily appear, that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the objector. It is not shown nor suggested that the rights of the de-

defendants have been prejudiced in any manner in the matter of the sale which was confirmed: See *Wolfer v. Hurst*, 50 Or. 218 (91 Pac. 366). A resale was granted in this case upon the former appeal in order that the sale of personal and real property might be made separately, so as not to complicate the matter of redemption. That object has been attained. The trial court in granting the order of confirmation did not construe its rules to require service of the motion for confirmation. Obviously, the same power that adopted the rule could construe it: 15 C. J., § 294. A final decree had been entered in the case directing that the property be sold. The defendants had knowledge of this. An *alias* execution was regularly issued and the property duly advertised for sale and sold. The defendants no doubt expected that such proceedings would be taken. The sale was ordered confirmed without objection.

In the case of *Brand v. Baker*, 42 Or. 426 (71 Pac. 320), former Justice BEAN said in the opinion:

“The law does not require notice to a judgment debtor of a proposed effort to collect the judgment against him, nor of the levy and sale of his property under an execution issued thereon, except by the filing of a sheriff’s certificate in the county clerk’s office, and the publication and posting of notices of sale.”

In order for defendants to raise any issue concerning the sale of the real estate, it was necessary for them to file objections thereto within the time provided by the statute. Not having done so they have no cause for complaint. Our statute does not require service upon the judgment debtor, of a motion for confirmation of sale. Counsel for defendants does not claim that it does.

We find no prejudicial error in the record. The judgment of the lower court is therefore affirmed.

AFFIRMED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued at Pendleton October 29, affirmed and modified December 24, 1918. Argued on rehearing at Pendleton May 5, former opinion adhered to September 9, 1919.

RUNNELLS v. LEFFEL.

(176 Pac. 802.)

Partnership—Duty of Partners—Good Faith.

1. One partner owes a duty to the other partner of fair dealing, and this relationship continues even after the dissolution of the partnership, as to the items or contracts or assets remaining unsettled.

[As to agreement to share losses as essential to existence of partnership relation, see note in *Ann. Cas.* 1913B, 1335.]

Partnership—Dissolution—Action for Accounting—Pleading—Fraud—Neglect.

2. In suit against a former partner for an accounting, any fraud, neglect or misfeasance must be alleged in order to be available.

Partnership—Contracts—Accounting—Dissolution.

3. A contract with a partnership for the handling of real and personal property and the payment of commission for the sale thereof dies with the dissolution of the partnership, and where after dissolution one partner allows a contract of sale to be canceled, and a new contract is entered into whereby the seller transfers the property to a third person, another partner is not entitled to participate in a commission paid in connection with the second transfer.

Costs—Equity.

4. In a suit in equity for an accounting, the taxing of costs is a matter within the discretion of the trial court as between the accounting parties, but third persons made defendants for the sole purpose of attaching property in their hands should be allowed costs on dismissal of the complaint: *Section 567, L. O. L.*

ON REHEARING.

Partnership—Accounting—Fraud—Necessity of Pleading.

5. In suit between partners for an accounting of commissions earned on a sale, which sale was not consummated by the buyer, but rescinded,

and the property resold to the buyer's wife, to be available as a ground of recovery, fraud, collusive or otherwise, in that such second sale to the wife was a subterfuge to prevent plaintiff from receiving his share of the commission earned on the original sale, must be pleaded.

BEAN, BENNETT and JOHNS, JJ., Dissenting.

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc.

This is a suit for an accounting between A. M. Runnells, plaintiff, and W. E. Leffel, defendant. The other defendants are brought in the case for the purpose of attaching funds placed in their hands by the defendant, W. E. Leffel.

In 1915 and up to the latter part of the year 1916 plaintiff and defendant W. E. Leffel were partners in the real estate business under the firm name and style of Leffel & Runnells, each having an undivided one-half interest in the business. Some time shortly before the 1st of January, 1917, the partnership was dissolved. In the fall of 1915 the partnership had a contract with one C. B. Mays for the sale of twenty-four hundred (2400) acres of land near North Powder, Oregon, together with personal property used in connection with the same. In November, 1915, a sale was negotiated by said partnership of the farm and personal property of C. B. Mays to G. P. Higinbotham, the real property being sold for \$45,000 and the personal property for several thousand, the exact amount not appearing in the evidence. At the time of making this sale Higinbotham paid \$3,000 to Mays in cash, and within a few months made a further payment of \$6,000. The partnership was to receive the sum of \$6,000 commission, and \$500 thereof was paid in cash and an allowance for expense, at the time of making the sale. At such time G. P. Higinbotham executed certain notes covering the balance of the purchase

price to C. B. Mays, and on December 11, 1915, \$20,000 of said notes were placed in the hands of J. E. Lenhart of North Powder to hold and collect the same. At the time of such delivery a contract was entered into between the partnership and C. B. Mays, wherein said partnership was given, to secure the balance of their commission amounting to \$5,500, an interest in said notes, and the agreement with the escrow-holder provided for the payment of their interest as the amount of the notes should be collected, and attached thereto was another memorandum stating in effect that the interest of said partnership in said notes would cease and determine in the event they were not paid. During the following year C. B. Mays had some difficulty with G. P. Higinbotham about the payment for the personal property sold, and in the fall of 1916 one of the notes due in connection with the contract of sale was not paid by G. P. Higinbotham, and from that date on until in July, 1917, efforts were made on the part of C. B. Mays to obtain payments on his contract, and ejectment proceedings against G. P. Higinbotham were threatened by C. B. Mays. In the purchase of this land from C. B. Mays, Maggie Higinbotham, the wife of G. P. Higinbotham, refused to join but continued to operate her own ranch near Echo, Oregon. On the sixth day of July, 1917, G. P. Higinbotham and C. B. Mays in the presence of the defendant W. E. Leffel canceled the contract of sale and purchase between Mays and Higinbotham, and the notes executed by G. P. Higinbotham were surrendered to him. On the same day C. B. Mays agreed to sell the real estate theretofore contracted to be sold to G. P. Higinbotham to his wife, Maggie Higinbotham, for \$39,000, \$17,000 to be paid in cash and the balance in notes. For making this sale W. E.

Leffel received \$4,400 in cash and a note of Maggie Higinbotham for \$1,500 as commission. This sale was consummated about the sixth day of August, 1917, by the execution of a deed to Maggie Higinbotham of the property of the Mays ranch. On August 31, 1917, plaintiff filed his suit for an accounting, setting forth therein the creation of the partnership between plaintiff and defendant Leffel, the sale of the Mays ranch to Higinbotham, and the amount of commission earned thereby by the partnership, the execution of the notes by G. P. Higinbotham to C. B. Mays, and of the contract between said partnership and Mays for an interest in said notes to secure the payment of the commission, and then makes the following allegations:

“That on or about the — day of —, 1917, at the request of the said Higinbotham and said defendant, W. E. Leffel, the said C. B. Mays and — Mays, his wife, conveyed said lands to Maggie Higinbotham; and at all times herein mentioned the said Maggie Higinbotham has been, and now is, the wife of the said G. P. Higinbotham.

“That said lands were so conveyed to the said Maggie Higinbotham under and by virtue of the terms and conditions of said contract between the said Mays and plaintiff and said defendant, W. E. Leffel, and under and by virtue of the terms and conditions of said contract between the said Mays and the said G. P. Higinbotham.

“That at the time of said conveyance, on or about said — day of —, 1917, the balance of said purchase price was paid, with the exception of a part of the interest accrued thereon.

“That on or about said — day of —, 1917, said defendant, W. E. Leffel, collected and received from the said Mays a certain sum (or certain sums) of money in payment of the balance of said commission, and so received and collected the same as the money of plaintiff and said defendant and as belonging to

plaintiff and said defendant by reason of said sale of said lands and personal property as such partners; and the said Mays paid said certain sum (or certain sums) of money to said defendant, W. E. Leffel, as the balance of said commission. But plaintiff does not know what amount of money was so paid by the said Mays and collected and received by said defendant, W. E. Leffel.

"That said defendant, W. E. Leffel, has failed and neglected to account to or with plaintiff for said money so collected and received by said defendant."

The complaint further alleged the insolvency of Leffel and asked for a restraining order against the said defendants in regard to the funds in their possession, which, it was alleged, was the commission received on the sale to Maggie Higinbotham. The answer admits in effect the partnership that had existed between plaintiff and defendant W. E. Leffel, the sale of the C. B. Mays ranch to G. P. Higinbotham, and the commission earned thereby, the interest of the partnership in the notes given by Higinbotham, and then set forth that such interest in said notes would terminate in the event they were not paid, and that by reason of the failure of G. P. Higinbotham to carry out his contract of purchase, the contract had been canceled and surrendered up by G. P. Higinbotham, and the notes canceled and returned to him. That the partnership had no further interest in and to said notes or commission represented thereby, and set up as a counterclaim a request for an accounting of other partnership matters as against the plaintiff herein. A decree was entered dismissing the complaint and denying the relief sought by the defendant W. E. Leffel and dissolving the injunction and denying costs to either party. Plaintiff appeals generally, and

defendants file a cross-appeal on the ground that their costs should have been allowed to them.

AFFIRMED AND MODIFIED.

For appellant there was a brief and an oral argument by *Mr. A. S. Cooley*.

For respondent W. E. Leffel there was a brief over the names of *Messrs. Cochran & Eberhard* and *Mr. A. W. Schaupp*, with oral arguments by *Mr. Colon R. Eberhard* and *Mr. Schaupp*.

For respondents Alice Leffel, First National Bank of Joseph and First Bank of Joseph, as cross-appellants, there was a brief over the names of *Messrs. Cochran & Eberhard* and *Mr. A. W. Schaupp*, with oral arguments by *Mr. Colon R. Eberhard* and *Mr. Schaupp*.

OLSON, J.—This is a suit for an accounting as to moneys received by one partner after a dissolution of a partnership on contracts and notes made before the partnership was dissolved. The complaint alleges in substance that said commission had been earned by reason of the sale of real and personal property, and to secure this commission an interest in certain promissory notes executed by the purchaser of said property had been assigned to the partnership; that at the request of such purchaser and the defendant, W. E. Leffel, a deed to the property was made to the purchaser's wife, and that such conveyance was made under the terms and conditions of the original contract with the purchaser; that a commission was paid to the defendant W. E. Leffel, and that such commission was paid under and by virtue of the original con-

tract between the partnership and C. B. Mays, and by virtue of the agreements subsequently made, giving an interest in the notes given by the purchaser of the land.

1, 2. We have read all of the evidence carefully but fail to find such contention supported. The evidence shows that the original contract between C. B. Mays and G. P. Higinbotham was canceled and the notes surrendered and that a new contract was made with Maggie Higinbotham and consummated. The original contract with G. P. Higinbotham was for the sale of both real and personal property, the real property amounting to \$45,000, and the personal property to several thousand dollars, the exact amount not appearing. The sale to Maggie Higinbotham was for the real property only, the consideration being \$39,000. The original commission to be paid to the partnership was \$6,000, of which \$500 was paid at the time of making the contract of sale. The commission collected by W. E. Leffel was \$5,900. There is evidence in the record upon which the lower court could have found that defendant W. E. Leffel conspired with C. B. Mays to cancel the old contract and have the property transferred to Maggie Higinbotham merely as a subterfuge in order to defraud his former partner out of his share of the commission, but nowhere in the complaint is there an allegation of fraud on the part of W. E. Leffel, nor of any conspiracy. There is evidence that would seem to show that W. E. Leffel did not take his former partner into his confidence as to the exact situation in regard to the Mays-Higinbotham deal, nor give his former partner an opportunity to protect himself in saving his share of the commission, but there are no allegations in the complaint as to these matters. The complaint seeks an accounting as

to the proceeds of a certain definite contract and the notes securing the same. The evidence of the plaintiff clearly shows that these notes were not paid, and that no proceeds were received under the terms of said contract. It is true that one partner owes a duty to the other of fair dealing, and that this relationship continues even after the dissolution of a partnership as to the items or contracts or assets remaining unsettled, but the relation of partnership does not exist as to matters outside of the particular contracts, assets or items so remaining. It is also true that one partner cannot willfully dissipate the remaining unsettled assets and avoid liability for such accounts, but in a complaint filed against him the fraud or neglect or misfeasance complained of must be set out. It has been held by this court that fraud must always be alleged in order to be available: *Leavengood v. McGee*, 50 Or. 233 (91 Pac. 453). All of the evidence in regard to the intention of defendant W. E. Leffel to defraud his former partner by securing the cancellation of the G. P. Higinbotham contract, by preventing a loan being made upon the property which might have prevented the cancellation of such contract, is clearly not responsive to any allegation of the complaint. The rule is clearly stated in *Eastman v. Jennings-McRae Logging Co.*, 69 Or. 1, 7 (138 Pac. 216, 218, Ann. Cas. 1916A, 185), as follows:

“Section 725, L. O. L., states the cardinal rule of evidence in the following words: ‘Evidence shall correspond with the substance of the material allegations, and be relevant to the questions in dispute.’ Each party shall prove his own affirmative allegations (Section 726, L. O. L.) that are denied by the other party. A plaintiff can recover only upon the allegations of his complaint. The facts constituting his cause of action must be stated in his complaint, and these allega-

tions he must prove, if they are denied. If he fails to prove any material allegation of his complaint that has been put in issue by an answer, he must lose.

"In *Union St. Ry. Co. v. First Nat. Bank*, 42 Or. 611 (72 Pac. 588), the rule is stated thus: 'It has often been held by this court that the plaintiff must prevail, if at all, upon the matters alleged in his complaint. * * *'"

3. Plaintiff contends strenuously that the moneys received from the sale of the property to Maggie Higbotham, whether such deal was fraudulent or not, were nevertheless paid to W. E. Leffel under and by virtue of the old commission contract between A. M. Runnells and W. E. Leffel and C. B. Mays. This contention is untenable for the reason that a contract with a partnership for the handling of real and personal property and payment of commission for the sale thereof, dies with the dissolution of the partnership. It is not an assignable contract. It has served its purpose in the sale originally made to G. P. Higbotham, and the rights to a commission as to that sale had already accrued. Such commission contract was not alive for the benefit of the partnership for any sale made to third parties after the dissolution of such partnership.

4. The defendants have filed a cross-appeal on the ground that costs should have been allowed them in the lower court. The taxing of costs in equity cases is a matter within the discretion of the trial court. In view of the fact that defendant W. E. Leffel came into court seeking affirmative relief by way of an accounting, we cannot see there was any abuse of discretion in the trial court in refusing him costs, but as to the other defendants who were brought into court without being concerned in the proceedings, other than being in pos-

session of moneys sought to be impounded, they are in a different position and should be allowed their costs.

Affirmed and modified as to costs.

AFFIRMED AND MODIFIED.

HARRIS, J., absent.

Former opinion adhered to on rehearing September 9, 1919.

ON REHEARING.

(183 Pac. 756.)

Mr. A. S. Cooley, for the petition.

Messrs. Cochran & Eberhard and Mr. A. W. Schaupp, contra.

In Banc.

BENSON, J.—For a general statement of the facts of this case reference is made to the former opinion of this court herein: *Runnells v. Leffel et al.*, ante, p. 342 (176 Pac. 802).

The vital issue, as there disclosed by the complaint, and denied by the answer, is this: Was the conveyance to Mrs. Higinbotham, executed on August 6, 1917, made to her in consummation of the original contract between Mays and Mr. Higinbotham, and at the request of the latter and Leffel, or was it a new and independent deal? The evidence of all the parties who participated in the negotiations of July 7, 1917, tends to establish the following facts; that Mays and Leffel had, for some time been importuning Higinbotham to make some payment upon his overdue notes, and without success. On the morning of July 7th, Mays notified the delinquent vendee that he must either make a substantial payment or that ejectment

proceedings would immediately follow. Higinbotham replied that he was unable to make payment, and proposed to give up the executory contract and possession of the land, in exchange for his notes. Mays accepted this offer, and upon receiving the written contract from Higinbotham, returned to the latter his unpaid notes, and shortly thereafter, notified Leffel of what had occurred. Leffel then had a conversation with Higinbotham and his wife, in which she made a definite offer to buy the land herself for \$39,000. This offer was accepted by Mays, and on August 7th, Mays and wife, Higinbotham and wife and Leffel met at the law office of Mr. Slater, in La Grande, at which time Mrs. Higinbotham paid Mays \$17,000 in cash, and received a deed for the land in her own name, executing to Mays a mortgage in the sum of \$22,000, for the remainder of the purchase price. She testifies, very positively, that her husband did not furnish a dollar of the money which she paid for the land and has no interest therein. She says that Mays and Leffel had importuned her frequently to help her husband in making payments under his contract, and that she had always refused to do so, and that her purchase of the property was entirely independent of any prior negotiations between her husband and Mays and Leffel.

The plaintiff does not undertake to meet this testimony with substantive evidence of any other character, but contends that since Mays always urged that his net price for the land was \$39,000, and that he had received that amount, he must necessarily credit Mrs. Higinbotham with the \$9,000 in payments which had been forfeited by her husband, and that her relationship to the former vendee, and the circumstances surrounding the transaction, indicate that the second sale, to the wife, was a deceitful subterfuge, perpe-

trated by the several parties thereto, in order to prevent the plaintiff from receiving his share of the commission earned by negotiating the original sale. If this contention be the correct one, then the conduct of Leffel, Mays, and the Higinbothams amounted to a collusive fraud; but the complaint does not plead fraud of any kind, and no rule of pleading is more firmly established than that to be available as a ground of recovery or defense, fraud must be pleaded.

It follows that we must adhere to our former opinion.

FORMER OPINION APPROVED.

BEAN, J., Dissenting.—This is a suit for an accounting of the partnership transactions between A. M. Runnells, plaintiff, and W. E. Leffel, defendant, who were partners in the real estate business under the firm name of Leffel & Runnells, from September, 1915, to the last of December, 1916. Each had a one-half interest in the business. There was no written agreement of partnership.

Defendant states that the partnership arrangement was made by degrees. Mr. Runnells kept a law office during the time. As might well be expected, differences arose in regard to expenses, and after the dissolution there was a disagreement as to the division of commissions.

A rehearing has been granted in this case upon a question of fact. The former opinion appears in 176 Pacific Reporter, 802. Soon after the time of the partnership agreement the firm obtained a contract or option for the sale of 2,400 acres of land near North Powder, Oregon, for one C. B. Mays for the price of \$39,000. All over that amount obtained for the land was for the benefit of Leffel & Runnells. About November, 1915, a sale of the land was negotiated by the

firm to G. P. Higinbotham, for \$45,000, making a commission of \$6,000 for Leffel & Runnells. Three thousand dollars in cash was paid to Mays, and about the next March, a payment of \$6,000 was made. At the time of sale, \$400 cash was paid Leffel & Runnells, and an allowance made to Mays for expenses of \$100, making a payment of \$500 on the commission. A contract of sale from C. B. Mays to G. P. Higinbotham was executed, and also certain notes covering the balance of the purchase price. The notes were dated November 1, 1915, bearing interest 8 per cent. On the eleventh day of December of that year an agreement in writing was entered into between C. B. Mays and Leffel & Runnells for the delivery to J. E. Lenhart as the holder of the following portion of the notes: No. 1 for \$5,000, due November 1, 1916. No. 2 for \$5,000 due November 1, 1917. No. 3 for \$10,000 due January 1, 1918. The holder was to use due diligence in collecting the notes. It was agreed between the parties that the money collected on these notes should be paid in the following manner: Note No. 1 for \$5,000, due November 1, 1916, \$4,000 with interest to be paid to Mays, and \$1,000 with interest to be paid to Leffel & Runnells. Note No. 2 for \$5,000, due November 1, 1917, \$4,000, with interest to be paid to Mays, and \$1,000 with interest to Leffel & Runnells. Note No. 3 for \$10,000 due January 1, 1919. Six thousand five hundred dollars with interest to be paid to Mays, and \$3,500 with interest to Leffel & Runnells. It was stipulated as follows:

“That the intent of this agreement is that the party of the first part (C. B. Mays) is the owner of \$14,500 principal of the above notes, and that parties of the second part (Leffel & Runnells) are owners of \$5,500 principal of the above notes.”

Attached to the contract of December 11, 1915, was another memorandum signed by Leffel & Runnells and C. B. Mays and his wife to the effect that it was agreed on December 11, 1915, as regards the G. P. Higinbotham notes, "that should said C. B. Mays be compelled to take the ranch back in lieu of payment of the notes given by G. P. Higinbotham, that the interest of W. E. Leffel and A. M. Runnells in the notes in the above-mentioned agreement ceases." This agreement and the \$20,000 in notes were delivered to Mr. Lenhart to hold pursuant to the contract. He so held the notes and the agreement until he left the state and turned them over to another to hold for the same purposes.

About the time of the sale of the ranch, Mr. Mays sold some livestock and other personal property to Mr. Higinbotham, amounting in value to seven or eight thousand dollars. The sale of the personal property is not involved in this suit except as it may have a bearing upon the transactions relating to the real estate. Leffel & Runnells were not interested in the sale of the personalty.

The matter drifted along until July, 1917, without any payment of principal or interest being made on the notes. Efforts were made by C. B. Mays and Leffel & Runnells to obtain a loan for Mr. Higinbotham in order to enable him to pay twenty or twenty-five thousand dollars of the notes. This was without success. An effort was also made to interest Maggie Higinbotham, wife of G. P. Higinbotham, to secure the money for her husband. She was the owner of a valuable ranch in Umatilla County. About June, 1917, Mr. Mays, after repeated requests made at different times, insisted that the interest should be

paid, and something paid on the principal. On July 7, 1917, apparently for the purpose of making some adjustment of the matter, Mr. Mays and his wife, and Mr. Higinbotham and his wife, together with Mr. Leffel met in the City of La Grande, Oregon. Mr. Mays pursuant to the consent of Mr. Leffel made on behalf of Leffel & Runnells, obtained the contract of December 11, 1915, and the \$20,000 in notes and took them with him to this meeting at La Grande. Mr. Mays informed Mr. Higinbotham in effect that he must have a part of his money or he would eject him from the land. Mr. Higinbotham had prior to that time encouraged Mr. Mays to believe that he would obtain a portion of the money and make payment, and when the last demand was made by Mays, Higinbotham stated to Mays, as we understand his language, that if he did not make payment, he did not want any additional expenses made, and that he would deliver possession of the land. After this, largely through the instrumentality of Mr. Leffel, an agreement was made with the consent of Mr. Mays and Mr. Higinbotham that Mrs. Maggie Higinbotham should take the land and pay Mr. Mays \$39,000. As Mr. Mays testifies, the other deal was entirely settled. Mr. Mays stated to Mr. Leffel when this adjustment was proposed, "that he must have \$39,000 net for the land."

C. B. Mays, as a witness for plaintiff, relates the transaction at length. He states that—

"I talked with Mr. Higinbotham somewhere on the street concerning it, and he told me that his wife would not help him out on it, and asked me to give him a little more time, and talked on just like he always did,—started to lie to me about it, just the same as he always did, and I told him I had heard that kind of an harangue long enough, and there was only two

things to do,—to pay me or I would start ejectment proceedings.”

At that time, Mr. Mays informed Mr. Leffel of his conversation with Mr. Higinbotham. Mr. Leffel said he would go back to the hotel and have a talk with Mrs. Higinbotham, and see what he could do. Mr. Mays testified further:

“He [meaning Higinbotham] agreed right there to give me back the paper. * *

“He agreed to give me back the place. * * I agreed to take it back, because he didn’t feel that he ought to go to any extra expense on it, and he didn’t know that I ought. That is the amount of it. * * ”

Mr. Mays further stated:

“Right there and then, we agreed to that kind of an arrangement, and he,—I think we walked,—I don’t know whether we walked right on to Slater’s office,—Well, he said there he was willing to turn the place back to me; that he could not do anything, and his wife wouldn’t help him. So then,—well, it is possible Leffel was along then I don’t remember just when we did talk about it, but he and I had talked about it, and he said he would go back to the hotel and have a talk with her, to see if she cared to do anything about it going through, and if not, he thought the best thing for me to do was to step in and get them off the place; they weren’t doing anything any way. * *

“Yes, he [Leffel] told me, about dinnertime,—was about the time we had this talk, that the old lady absolutely refused to help the old gentleman, and I think then Leffel and I talked out the conversation he had with them at the ranch. I think that was then too. * *

“As well as I remember it was agreeable to Leffel for me to take these papers back,—take this ranch back, I mean and my contract and things with this land, and he went and had a talk with her and came back to me during the afternoon. I,—as I said a minute ago, I don’t remember what he and I did then,

but I know I talked with Leffel right away after talking with Higinbotham. He came to me again and told me, and whether I went on up to the hotel with him or not, I can't remember, but we walked about while talking these different things, and he told me that there was absolutely no use trying to do anything further about it, and that he was perfectly willing for me to take the place back, and then later,—it seems to me later in the day,—I didn't see Leffel for quite awhile, and he talked with Mrs. Higinbotham, and he came back and talked to me afterwards,—if as I had taken the place back from Mr. Higinbotham, if I would consider selling it,—something to that effect, and I said, 'Yes, I would sell it to anybody, so I got thirty-nine thousand out of it' and a little later he came back and * * he says 'Your ranch is sold, for I will sell it to the old lady,'—something like that. I can't remember the exact conversation. * *

"Any way after Higinbotham gave me these papers, we went up to Slater's office. I stated it to him like I would to any other man,—if she wanted that ranch, let's get busy while she was in the notion. So we went up to this office, and Higinbotham gave me his papers,—he had a copy of this contract still, and I gave him the notes,—I think that's it,—I gave him the notes about that time."

To the question:

"State whether or not you had possession of the notes of G. P. Higinbotham at the time you got that fifteen hundred dollar check from Mrs. Higinbotham."

This witness answered:

"No, because we had fully decided and settled that part of it and then later,—some time a little later, we made an agreement there, and I think she paid me fifteen hundred dollars then, but I don't know for sure if she did right then, but she paid me the balance of it at the time the deed was made any way,—the fifteen thousand."

Mr. Mays states in effect that by arrangement with Mrs. Maggie Higinbotham he got even	\$1,500
And at the time of the execution of the deed, Aug. 6, 1917	15,500
And the balance of the \$39,000, in notes and the mortgage for.....	22,000
Total.....	<hr/> \$39,000

The \$1,500 note of Mrs. Higinbotham was, pursuant to an understanding with Mr. Mays, given to W. E. Leffel as for a loan to Mrs. Higinbotham. In addition to that Mr. Mays paid Mr. Leffel by check \$4,400, making with the amount of \$400 theretofore paid to Leffel & Runnells, \$6,300, besides the \$100 of expenses, paid by Mays in settlement of the commission and interest on the portion of the notes which Leffel & Runnells owned, and which were deposited with Lenhart, as shown by the agreement of December 11, 1915.

Mr. Mays also testified as follows:

"Q. And after you turned the land over to Mr. Higinbotham, or after Mr. Higinbotham went on the land and took possession of it, did you again take the land and use it yourself?

"A. Well, I took the land back, but I didn't use it.

"Q. What do you mean by taking it back, Mr. Mays?

"A. I mean that Mr. Higinbotham could not pay for the land, and turned it over to me,—turned the papers over to me. That is what I mean.

"Q. When?

"A. Well, some time in July.

"Q. Who was present?

"A. That took place at Mr. Slater's office, the same time I mentioned before when were in his office there at that time.

"Q. Mr. Higinbotham, Mrs. Higinbotham, Mr. Leffel and Mr. Slater and yourself, you mean?

"A. And my wife."

Again he states thus:

"A. From the time Mr. Higinbotham took charge of the land, according to his contract, until the time that he turned the papers back to me, I didn't have possession of that place or conduct it.

"Q. But since he turned the papers back have you had possession?

"A. Well, I had possession of the papers. The man hadn't moved off and I hadn't moved on."

In regard to the Higinbotham notes, Mr. Mays stated:

"Q. In other words, Mr. Mays, I mean, did you at that time and shortly prior to that time, figure up the interest that had accrued on these notes, and know about what that interest was at that time?

"A. Yes, I knew at that time about what it should be.

"Q. Well, did you at the time you conveyed to Maggie Higinbotham receive more than the face of these notes?

"A. More than the face of these notes mentioned here?

"Q. Yes.

"A. Yes."

Upon being asked when title to the land actually passed from him, Mr. Mays stated that he never did give title to G. P. Higinbotham; that the title actually passed in the fore part of August, 1917, when his wife and himself and Mr. Leffel, Mr. Slater, Mrs. Maggie Higinbotham and G. P. Higinbotham were present.

"A. In J. D. Slater's office is where I did all of the talking. * *

"Q. At that time did you pay any commission for the selling of the property? * *

"A. I paid to Leffel the difference in what I asked for the farm and what he sold it for. * *

"Q. Now when was you asking that certain price for the land—1915 when the contract was made?

"A. I didn't ask any different price on the land at any time to different persons.

"Q. In 1915 what was the price you fixed on the land, or the property to be sold?

"A. Thirty-nine thousand. * *

"Q. And subsequent to that time and up to the time when you finally made a deed, conveying that property to someone else, did you ask any other or different price than the thirty-nine thousand?

"A. No."

Mays also states that he lost in the transaction as some of the cattle, which he had contracted to Higinbotham and the increase thereof, died. It appears that Mr. Mays did not make a close estimate of the interest on the Higinbotham notes.

As we figure, the principal and interest to August 6, 1917, amounts to \$41,080. Adding the amount paid by Higinbotham, \$9,000, makes a total of \$50,080, the original price of the land \$45,000 and interest.

Mr. Mays actually received of G. P. Higinbotham	\$9,000
Of Mrs. Maggie Higinbotham.....	39,000

Total amount received.....	\$48,000
Amount of interest actually deducted in the final settlement	\$2,080
Out of the total amount received by Mr. Mays he paid as commission at the time of the contract with G. P. Higinbotham.....	\$ 400
Note of Mrs. Higinbotham.....	1,500
Checks	4,400
Total amount of commission including the expenses	100
Makes	\$6,400

Taking the interest of Leffel & Runnells in the \$20,000 notes deposited with Lenhart, \$5,500, adding interest at 8 per cent to August 6, 1917, \$776.12, makes the total amount of the commission due on that date \$6,276.12.

The amount deducted on the interest of the notes for the commission was \$376.12.

It is sometimes said there is veracity in figures. Taking these figures, they clearly show that Mrs. Hig-inbotham not only received the full benefit of the \$9,000 paid by her husband on the ranch, but did not pay the full amount of the interest on the balance. Mrs. Maggie Higinbotham was a witness for defendant. She fixes the time of making arrangements for her taking over the ranch definitely as July 6, 1917. She testified to the effect that she was requested by Mr. Mays to assist her husband financially in the purchase of the ranch about a week before the time they came to La Grande; that she told Mr. Mays that she would not give a mortgage on her ranch at Echo, and that at La Grande Mr. Leffel endeavored to get her to assist her husband, and she refused; that Mr. Leffel first suggested to her to buy the place on the 6th of July, 1917; that she did not know of any final understanding between Mays and her husband as to what was going to happen to her husband at that time. She states that the transaction was in substance as follows: "Mr. Mays said he would deed me the ranch if I would give him \$15,500 cash, and he would take my notes for the balance;" that that was the way the deal went through; that she gave him a note for \$1,500 at the time (this is the note to Leffel, as we understand) and made a cash payment of \$15,500, and gave a note and mortgage for \$22,000; that her husband had nothing to do with the \$15,500, but she thought that he signed

the note for \$1,500; that the deal was made on the 6th day of July. "I had nothing to do with the old deal." She stated that she came to La Grande on the 6th of July for the reason that "Higinbotham was trying to make some settlement with Mays." At page 242 of the transcript, she states:

"Well, I understood that,—from Mr. Higinbotham, he wanted me to kind of help him out on the land."

Mrs. Higinbotham understood from Mr. Higinbotham that Mr. Leffel wanted her to come to La Grande on the proposition of making a settlement some way with Mr. Mays; that she never thought of buying the land until the sixth day of July; that the deed of the land was made to her on August 6, 1917; that there might have been something said about what Higinbotham had paid on the land, she did not recollect it; that the \$1,500 note was given to W. E. Leffel; that it represented that she borrowed \$1,500 from him, "He furnished it to Mays"; that her husband was present when Mr. Leffel suggested that she purchase the land; that it was sometime after dinner.

"Q. And did you then go to Mr. Slater's office and make a contract concerning your buying the land?

"A. After I talked it over with Mr. Higinbotham, I did."

Mrs. Higinbotham talked with her husband about the advisability of buying the land.

It is the contention of plaintiff, as made by his complaint, that at the request of Higinbotham and defendant W. E. Leffel, C. B. Mays and his wife conveyed the land to Maggie Higinbotham under and by virtue of the terms and conditions of the contract of December 11, 1915, between Mays and Leffel & Runnells.

The contention of the defendant is that under the agreement of December 11, 1915, and the supplemental memorandum attached thereto, that Higinbotham failed to make payment and turned "the ranch back in lieu of payment of the notes given by G. P. Higinbotham," and therefore the interest of Leffel & Runnells in the notes had ceased, and that there was a separate and independent sale of the ranch made to Mrs. Maggie Higinbotham.

After a careful reading and consideration of all the testimony, we are firmly convinced there was only one price and one sale of the land in question. It was agreeably arranged between Mr. Higinbotham and his wife that she should take title to the land and make payment of the balance of the notes and interest given therefor, after a portion of the interest was "knocked off."

For the notes in question of G. P. Higinbotham,

Mr. C. B. Mays received, note of Mrs.

Maggie Higinbotham \$1,500

Also signed by G. P. Higinbotham.

And cash of Mrs. Higinbotham..... 15,500

And notes and mortgage of Mrs. Higinbotham. 22,000

Total.....\$39,000

Which was entirely satisfactory to Mr. Mays, and fully satisfied the G. P. Higinbotham notes. Out of this amount received, Mr. Mays paid Leffel on account of the interest of the firm of Leffel & Runnells, \$5,900.

Plaintiff claims in his complaint, and it is supported by the testimony, that the conveyance of the lands by C. B. Mays and his wife to Mrs. Maggie Higinbotham on August 6, 1917, was made under and by virtue of the contract of December 11, 1915, between Mays and Leffel & Runnells, and in satisfaction of the notes

mentioned and described in that agreement, and pursuant to the terms of the contract of sale of the ranch between Mays and G. P. Higinbotham.

The original option or contract for the sale of the land between C. B. Mays and Leffel & Runnells had served its purpose. It had been carried out by Leffel & Runnells in negotiating the sale of the land to G. P. Higinbotham, and has no further force or effect. It should not be confounded with the contract of December 11, 1915, as to the ownership of the notes.

Mr. Mays states that he paid Leffel the difference in what he asked for the farm and what he sold it for. Mays states that his price for the ranch, at all the times mentioned, was \$39,000 net. Mrs. Higinbotham paid that sum. All agree to that. Then if this was what the land was sold for, Leffel was paid nothing. Mr. Leffel states that Mays' price for the land to Mrs. Higinbotham was \$33,100, but we take Mr. Mays' statement in this regard. He appears to be a disinterested witness.

Mr. Mays is a man of business and understood the transaction. He plainly states that his price for the land was \$39,000 net, and that he got what he asked; that he made only one price at any time during the transaction. It was impossible for him to make and receive a net price of \$39,000 from Mrs. Higinbotham, when he only received from her \$39,000, and out of that amount paid as commission \$5,900 to Mr. Leffel. That would leave a net price of only \$33,100. There are several earmarks in the transaction that show that the deal with Mrs. Higinbotham was an adjustment of the contract of December 11, 1915, and settlement of the original deal with G. P. Higinbotham. Mr. Leffel states in his testimony that when he mentioned the matter of negotiating with Mrs. Higinbotham, be-

fore Mr. Mays gave him an answer, he and his wife did some figuring; that he left them figuring and went away and got a cigar. When he returned Mays gave him the terms. Mr. Mays recognized his responsibility for the commission included in the notes deposited with Lenhart, and he only obtained the notes and contract from the holder, who was substituted for Lenhart, by the consent of Mr. Leffel, which could only have been made for Leffel & Runnells. Leffel & Runnells owned an interest in the \$20,000 of notes deposited under the agreement to the amount of \$5,500, with interest thereon at 8 per cent. This property right could not be obliterated or effaced by a mere juggle of words or turn of the hand. Giving one hundred per cent force to the memorandum attached to the agreement of December 11, 1915, between Leffel & Runnells and C. B. Mays and his wife, Mr. Mays was never "compelled to take the ranch back in lieu of payment of the notes given by G. P. Higinbotham." That contract in regard to the interest of Leffel & Runnells in the notes mentioned in the agreement should be given a fair construction as intended by the parties thereto, when the same was made. Such a construction would be that if the deal was not carried out, and Mr. Mays was compelled to cancel the contract of sale with Higinbotham, and take possession of the land, and never receive his payment of the notes, then he should not pay any more commission on the sale, and the interest of Leffel & Runnells in the notes should be canceled. Further, the contract was never intended to mean, and does not mean that Mr. Higinbotham did not have the right to sell and transfer his equity in the ranch to any third person. He had a perfect right to turn the place over to his wife and allow her to make the payment after a small reduction. It was not a

matter of concern to either Mr. Mays, Leffel or Runnells, to whom the title of the land was conveyed after full satisfaction of the notes was made. It seems strange that Mr. Leffel would claim that in 1917 he made a new sale of the lands without any written agreement as to his commission. He was an experienced real estate dealer.

The contention arises from the fact that Mr. Leffel, no doubt, attempted to make it appear that there was an independent sale made to Mrs. Higinbotham. As soon as G. P. Higinbotham indicated to Mr. Mays that if he did not make settlement he would turn the ranch back without expense, Mr. Leffel took it for granted that this was actually done. The change in the deal from Higinbotham to Mrs. Higinbotham was made practically all in one transaction, and as we understand Mr. Mays' testimony was all consummated in J. D. Slater's law office. The money collected by Mr. Leffel from Mr. Mays, August 6, 1917, was in satisfaction of the commission earned by Leffel & Runnells in the sale made to G. P. Higinbotham, and the defendant Leffel should account to plaintiff Runnells for one half thereof.

The statement of Mr. Leffel to Mr. Mays, when he said he would go back to the hotel and have a talk with Mrs. Higinbotham and if nothing could be done the best thing for Mays to do was to get them off the place, indicates that no definite action had then been taken to restore Mays to the possession of the land. Nothing was done in regard to taking the "land back" after that until the matter was arranged for Mrs. Higinbotham to take the farm and make the payment. A high rate of interest was provided in the notes, and it may well be that, as the place had run down somewhat, Mays would rather have the \$17,000 and secured

notes for \$22,000, than to insist upon all the interest being paid, and run the risk of being compelled to take the land. Leffel & Runnells before that had both indicated they would be glad to take about \$2,000 each for their share in the notes, as the balance of their commission. Mr. Leffel did exceedingly well to collect \$5,900.

It was understood in the partnership arrangement that Mr. Leffel should do the most of the work outside of the office in attempting to make real estate deals, and that Mr. Runnells should do the office business and assist in closing deals. Mr. Leffel was traveling a great deal during 1916. Made trips to North Powder, Walla Walla, Washington, and elsewhere, and incurred considerable expense.

The partnership trouble seems to have started on account of a purchase of a half interest in 320 acres of grazing land by Mr. Runnells at \$5 per acre. The title was taken in Mrs. Runnells' name. Mr. Leffel was in Walla Walla at the time attending to real estate business. Mr. Runnells telephoned him that he could make the purchase, and that he thought it would be a good thing for them to have the land to trade. There is a dispute between them in regard to the matter. We think that Mr. Runnells led Mr. Leffel to believe that he would make the purchase for the benefit of the firm, and he should be held to his contract. It was a part of the partnership business. The land was sold in a short time for \$8.25 per acre. Runnells should account to Leffel for one half of the profit, \$520. It is in evidence that on account of this transaction Leffel said: "He would get even with Runnells." The dissolution of the bonds between the members of the firm was culminated about the time that Mr. Runnells refused to pay a share of Leffel's ex-

penses while away from home on firm business. The agreement between Leffel & Runnells was somewhat carelessly made, and subject to change. Mr. Runnells claims that he paid out as much for expenses of the firm as Mr. Leffel did. The evidence does not bear this out. Leffel states the expenses to April, 1916, were settled. He itemizes his necessary firm expenses from April 4th to October, 1916, ranging from fifty cents to \$84.50, and amounting in the aggregate to \$489.10, which we find should equitably be shared by Runnells.

STATEMENT OF PARTNERSHIP ACCOUNT.

Leffel collected of Mays.....	\$5,900.00
Runnells received on land deal.....	520.00

Total	\$6,420.00
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First deducting expenses paid by Leffel.....	489.10
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Leaves	\$5,930.90
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To be divided equally, or each partner's share	\$2,965.45
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Leffel collected of Mays.....	\$5,900.00
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Paid out expenses.....	\$489.10
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Amount to be paid Runnells by Leffel.....	2,445.45
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	\$2,934.55
--	------------

Runnells retained profit on land deal.....	\$ 520.00
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Amount to be paid Runnells by Leffel.....	2,445.45
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Total amount to be received by Runnells.....	\$2,965.45
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Plaintiff is entitled to a decree against defendant for the sum of \$2,445.45.

The sums of money belonging to defendant Leffel on deposit in the name of defendant's wife, Alice Leffel, should be subject to the satisfaction of this decree.

The decree of the lower court should be reversed and one ordered entered in the Circuit Court in accordance herewith. Neither party to recover costs in either court.

BENNETT and JOHNS, JJ., concur in the foregoing opinion.

Argued April 16, modified June 10, rehearing denied September 9, 1919.

LE VEE v. LE VEE.

(181 Pac. 351.)

Frauds, Statute of—Parol Contract—Part Performance—Tenancy in Common.

1. Possession by tenant in common to constitute such part performance of his cotenant's agreement to sell her interest in the common property as to take the contract out of the statute of frauds must result in such a change of relation between the parties as would challenge the attention of anyone seeing the change, and would indicate that some contract had been made.

Specific Performance—Parol Contract—Part Performance—Sufficiency of Evidence.

2. In son's suit for specific performance of mother's parol contract to convey her interest in land owned by mother and son as tenants in common, evidence of son's possession of land under the agreement held not of that degree of clearness and certainty required to overcome the effect of the statute of frauds.

Specific Performance—Parol Land Contract—Part Performance—Evidence.

3. Generally a tenant in common, suing for specific performance of his cotenant's parol agreement to convey his interest in the common property, must prove the agreement, as well as his part performance of it, clearly and unequivocally by the preponderance of the evidence.

Frauds, Statute of—Avoidance of Contract—Degree of Proof.

4. The statute of frauds is stringent in its provisions, and to avoid its effect the testimony must be clear and explicit, showing a state of facts referable exclusively to the contract pleaded.

Appeal and Error—Review—Disposition as to Defendants Who Do not Appeal.

5. Where some of the defendants against whom judgment is rendered appeal and others do not appeal, the appellate court, in holding

lower court in error, will reverse judgment only as against the defendants who appealed.

ON REHEARING.

Tenancy in Common—When Devisees Become Tenants in Common.

6. Where a mother died seised of land with her son as tenant in common, the other children, the will devising to the son a life estate in the mother's share of the tract, subject to payment of certain charges, became tenants in common with the son; joint tenancy having been abolished by Section 7175, L. O. L.

Tenancy in Common—No Tenant can Do Act Affecting Title of Another.

7. Tenants in common hold their interest in the realty independently of each other, and neither one can do an act respecting the title which will bind the others.

Tenancy in Common—Grantee of Tenant in Common Becomes Such.

8. The grantee of a tenant in common becomes merely a new tenant in common with the remainder of the original holders.

Tenancy in Common—Single Cotenant can Recover Possession of Whole Land Against Stranger.

9. As against a stranger, one tenant in common may recover possession of the whole of the land held by himself and his cotenants.

Appeal and Error—Reversal as to Some Defendants Did not Affect Those not Appealing.

10. Where a mother for consideration agreed to convey to a son her share of land owned by them in common, and after her death he sued his sisters and brother, to whom the mother had devised the land subject to a life estate in his favor, and some of the children made no resistance, defaulting or withdrawing appearance, and decree was rendered for the son against all the other children, part of whom appealed, the reversal of the decree as to the children who appealed did not necessarily work a reversal as to those who did not contest the complaint.

[As to rights of cotenant, see note in 100 Am. St. Rep. 652.]

From Benton: GEORGE F. SKIPWORTH, Judge.

Department 1.

The plaintiff and his mother during the latter years of her life were tenants in common of a 32-acre tract in Benton County. The complaint is to the effect that in 1897 the mother in consideration of the plaintiff's promise to take care of her during the remaining years of her life, pay the expenses of her last sickness and burial and discharge a mortgage of \$500 then on the

property, together with any other encumbrances existing at her death, she would sell to him the undivided half of the property, conveying it to him either by deed or will. It further states in substance that she made a deed in pursuance of that contract and deposited it in a bank with directions to hold the same as an escrow and deliver it to the plaintiff on the performance of his covenant. He claims to have taken possession of the property and made certain valuable improvements thereon and otherwise to have performed the contract by taking care of his mother, paying the expenses of her last illness and funeral and burial expenses. He says that during the year 1910 his mother, without his knowledge or consent, withdrew the escrow from the bank. She died March 4, 1913.

The defendants, who are her other children with their several spouses, rely upon a will which she made and which has been admitted to probate to the effect that the plaintiff should have a life estate in her undivided half of the land on condition that he would pay all the claims against her estate and the expenses of administration. The plaintiff avers that he has demanded of the defendants a deed to the premises, which they have refused. After a denial of any contract the defendants plead that the alleged contract was not in writing and that if there was any such agreement it was rescinded by the concurrence of the plaintiff and his mother. For a third defense they state in substance the contents of the will already referred to and say that the plaintiff in acceptance of the terms of the will paid all the claims presented against the estate and accepted the conditions of the testament, wherefore he is estopped from claiming anything under or by virtue of the contract. They also allege that the plaintiff presented to the executor

a verified claim for the sums of money said to have been paid for the mother by the plaintiff, which are identical with those he was bound to pay under the contract upon which he relies, and that this constitutes a waiver by the plaintiff of that contract whereby he is estopped from claiming anything by virtue thereof. Lastly they aver that the fair rental value of the mother's interest in the land was about \$300 per annum; that the plaintiff ever since the time of the alleged agreement has had the use of the land; that his mother acted as his housekeeper for many years and performed valuable services in connection with the management of the place, for which she received no compensation, and that under all these circumstances the alleged agreement, if there was such a stipulation, was so grossly unequal and improvident that equity ought not to decree a specific performance.

The new matters of the answer are materially traversed by the reply. Affirmatively the plaintiff pleads ignorance of the law and facts which induced him to present to the executor his claim for moneys advanced to his mother. The Circuit Court heard the case and rendered a decree substantially according to the prayer of the complaint. All but three of the surviving children, defendants, either defaulted or withdrew their appearance, but those still remaining in the case have appealed.

MODIFIED.

For appellants there was a brief over the name of *Messrs. McFadden & Clarke*, with an oral argument by *Mr. Arthur Clarke*.

For respondent there was a brief over the names of *Mr. B. A. Klike* and *Messrs. Hewitt & Sox*, with an oral argument by *Mr. Klike*.

BURNETT, J.—Substantially the only witness for the plaintiff is himself. He narrates that he and his mother came to this state and after an unsuccessful venture on a larger farm they bought together the tract in dispute, taking title to themselves as tenants in common; that they lived together on the land for several years, she doing the housework and otherwise assisting in the management of the place and the marketing of its products, and all went smoothly until he married. The old lady, feeling herself supplanted by the daughter-in-law, left, and the plaintiff, according to his story, provided for her sustenance at various places in Corvallis and finally the mother took up her abode at the Patton Home in Portland. He says that he paid her expenses at the rate of twenty dollars per month at all of these places, as well as during a trip she made to some of the eastern states on a visit.

No effort is made to account for the contract, if it was in writing, or for the deed, beyond its withdrawal from the bank. The plaintiff does not claim to have had a copy of the agreement, if there was one, so that the question really turns upon whether there is sufficient evidence to prove a contract and, further, whether part performance has been shown sufficiently to support a decree compelling a conveyance.

As late as March 30, 1910, the plaintiff and his mother made the following agreement:

“Whereas, Chauncey Le Vee and Mary Le Vee are the owners and tenants in common of a certain 32.5 acre tract of land one mile north of Corvallis, and the said Mary Le Vee desires to go East, and it is arranged that said Chauncey Le Vee shall pay her \$20.00 a month for her support, in consideration of which he is not to be charged with rent for the use of said land.

“Now, therefore, it is agreed between said Chauncey Le Vee and Mary Le Vee as follows: Said Chaun-

cey Le Vee agrees to pay said Mary Le Vee the sum of \$20.00 per month for her support, said money to be sent to her at such place whatever she may be residing, and in consideration of such payment, said Mary Le Vee agrees that so long as payments are kept up, said Chauncey Le Vee shall not be liable for payment of any rent for the use of said premises. Said Chauncey Le Vee further agrees to pay the taxes on said land.

"This agreement may be dissolved by either party hereto, at any time hereafter.

"In witness whereof, the parties hereto have hereunto set their hands and seals, in duplicate, this March 30th, 1910.

"(Signed) MARY LE VEE. (Seal)

"(Signed) C. W. LE VEE. (Seal)

"In presence of:

"(Signed) E. E. WILSON."

It is admitted that within six months after the probate of the will the plaintiff presented to the executor his claim for moneys advanced to his mother for three years' interest on her half of the mortgage, for taxes on her half of the realty, for funeral expenses and claims and other demands discharged by him, amounting in all to \$1,955.

In *Tonseth v. Larsen*, 69 Or. 387 (138 Pac. 1080), Mr. Justice BEAN quotes with approval from 36 Cyc. 659:

"Possession, in order to be an act of part performance, either alone or in connection with other acts, is subject to several requirements. First, it must have been taken in pursuance of the contract. Further, it must be exclusively referable to the contract; that is to say, it must be such a possession that an outsider, knowing all the circumstances attending it, save only the one fact, the alleged contract, would naturally and reasonably infer that some contract existed relating to the land of the same general nature as the contract alleged."

1. In other words, there must be such a change of relation between the parties as would challenge the attention of anyone seeing the change and would indicate that some contract had been made. The rule is thus stated in the syllabus to *Roberts v. Templeton*, 48 Or. 65 (80 Pac. 481, 3 L. R. A. (N. S.) 790, note):

“Where a cotenant with a part owner of real property claims specific performance of an oral contract of purchase with another owner the proof must be clear that possession was taken under the oral agreement to constitute such a part performance as to avoid the statute of frauds.”

2, 3. Everything which the plaintiff claims he did in pursuance of the alleged contract, when viewed by an observer, is referable with equal force to the tenancy in common existing between the parties. No visible change was made respecting the possession of the land. Both the plaintiff and his mother lived upon it and operated it just as such holders of the title ordinarily would do. The plaintiff probably paid out money for his mother's support, but it was apparently derived from the proceeds of the crops of the land. Besides the fact that his acts already alluded to were consistent with the tenancy in common and contained nothing referring them exclusively to a contract, his other acts are utterly inconsistent with the idea that he had an agreement with his mother to buy the land. The quoted contract of March 30, 1910, is practically a lease which would not have been executed if he was holding the land as a purchaser. His act of presenting to the executor his claim against her estate for the items mentioned is likewise inconsistent with the theory that he had a contract to buy the land in consideration of those very payments. The evidence is not of that degree of clearness and certainty required

when it is sought to overcome the effect of the statute of frauds. The general rule is that the plaintiff must prove the agreement as well as his part performance of it, clearly and unequivocally by the preponderance of the evidence. If the testimony taken altogether is equivocal in its effect, so that it is left uncertain which is the true solution of the question, the plaintiff has failed to make his case by the preponderance of the testimony. It presents a situation analogous to what was said by Mr. Chief Justice McBRIDE in *Spain v. Oregon-Washington R. & N. Co.*, 78 Or. 355 (153 Pac. 470, Ann. Cas. 1917E, 1104):

“When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration.”

In short, by reason of the fact that all the things said to have been done by the plaintiff are easily referable to the relation of tenants in common existing between himself and his mother, and that the act of his taking what was substantially a lease of the premises on March 30, 1910, and his presenting a claim to her administrator are contradictory of his theory of contract, he has failed to make a case preponderating in effect over that made by the defendants. The case presented is not like *Woods v. Dunn*, 81 Or. 457 (159 Pac. 1158). There the will made by the former owner of the land was itself a writing sufficient to satisfy the statute of frauds. Besides this, the agreement was otherwise amply proved together with its unequivocal part performance by the plaintiff.

Stalker v. Stalker, 78 Or. 291 (153 Pac. 52), cited by the plaintiff, was a case where a member of the Church of Jesus Christ of Latter-day Saints had contracted

a plural marriage, which having been declared unlawful, he placed the plural wife on a piece of land which he bought for her for a home and left her in possession, going into another state. The agreement to give it to her for a home in settlement of her probable demands against him for support was clearly proved and she remained in the exclusive possession of the premises, while he never appeared upon them afterwards. Further, his writings substantially declared the true contractual relation.

Kelley v. Devin, 65 Or. 211 (132 Pac. 535), was a case where a father contracted with his son, who was long past the age of majority, to the effect that if the son would participate in the management of his father's property during the life of the latter, he would devise to him an undivided half of all his estate. This agreement was clearly proved by at least three disinterested witnesses and there was such a change in the management of the father's affairs by the participation of the son therein that anyone seeing the difference would be put upon inquiry about a contract, as that would be the only reasonable explanation of the change in management.

Sprague v. Jessup, 48 Or. 211 (83 Pac. 145, 84 Pac. 802, 4 L. R. A. (N. S.) 410), involved a contract between strangers evidenced by the purchaser's taking possession of the realty to the utter exclusion of the seller, besides which, part of the purchase price had been paid and a memorandum in writing signed by the seller indicated that the payment was made on account of the purchase price. In their facts and circumstances all these cases cited by the plaintiff differ widely from the one at bar and are not controlling here.

4, 5. The statute of frauds is stringent in its provisions, and to avoid its effect the testimony must be clear and explicit, showing a state of facts referable exclusively to the contract pleaded. This condition has not been fulfilled in the present instance, wherefore the decree of the Circuit Court, so far as it affects the parties who have appealed and contested the complaint, must be reversed. The decree must stand as to the other defendants. MODIFIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Rehearing denied September 9, 1919.

PETITION FOR REHEARING.

(183 Pac. 773.)

On petition for rehearing. DENIED.

Messrs. McFadden & Clarke, for the petition.

Messrs. Hewitt & Sox, contra.

BURNETT, J.—The plaintiff claimed he had a contract with his mother whereby, in consideration of his caring for her during her life, etc., she agreed to convey to him either by deed or by will an undivided half in fee of a tract of land which they owned in common. He charges in his complaint that she violated the contract and devised to him only a life estate in her half of the tract, conditioned upon his paying her debts and a mortgage upon the land. After her death he instituted this suit against his sisters and his brother and the spouses of those married, to compel a conveyance of the property. Some of the de-

defendants made no resistance to his suit, either defaulting or withdrawing their appearance. The Circuit Court, after hearing the testimony on the issues presented by the parties appearing, rendered a decree in favor of the plaintiff against all of the defendants according to the prayer of the complaint. Three of the sisters, answering defendants, and their husbands, together with the executor of the deceased mother's will, appealed, serving their notice upon the plaintiff only. Upon consideration of the testimony and the argument of counsel, it was determined here that the proof offered in support of the agreement relied upon by the plaintiff was not sufficient to establish the same. The conclusion was that so far as it affects the parties who have appealed, the decree of the Circuit Court should be reversed but that it should stand as to the defendants who did not contest the complaint. The petition of appellants for a rehearing urges that the decree should be reversed as to all the defendants, irrespective of whether they resisted the suit or not. In substance their argument is that the final decree on the merits determines the rights of the defaulting defendants and inures to their benefit, the same as if no decree *pro confesso* had been rendered against them. The contention of the movants for a rehearing is that the defendants are jointly liable, entailing a joint decree in any event whatever; and that if the suit fails as to one it must fail as to all.

The principle governing the matter is thus succinctly stated in 16 Cyc. 497:

“Failure of one defendant to answer and a decree *pro confesso* against him do not entitle plaintiff to take the allegations of his prayer as true against him who has answered. A final decree upon the merits cannot then be entered either against the defaulting

defendant or those not in default, without proof of the material allegations of the prayer. And even where a decree *pro confesso* has been entered against a defaulting defendant as upon issue joined by a codefendant and trial had it turns out that the bill ought not to be sustained as to either defendant, it will be dismissed as to the defaulting defendant as well as to the defendant not in default. This rule, of course, does not apply where the allegations in the bill against the defaulting defendants and the defenses of the answering defendants have no necessary connection, so that upon the trial it turns out that a final decree on the merits against the defaulting defendants is not inconsistent with a decree dismissing the bill as against the defendants not in default."

Sections 180 and 181, L. O. L., read thus:

180. "Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves."

181. "In an action against several defendants the court may, in its discretion, render judgment against one or more of them whenever a several judgment is proper, leaving the action to proceed against the others."

6-9. It well may be conceded that as a general rule there can be but one recovery upon a joint liability, and that the release of one who is jointly liable with others will discharge his co-obligors. The fallacy in the argument for a rehearing lies in the assumption that the defendants here are jointly liable. Without dispute, the mother died seised of the title to the property in question. Naturally, unless the course of descent was changed by her will, the land would descend to her children as tenants in common. The will

itself does not appear in evidence and from the record we obtain no knowledge of its provisions beyond the fact that it devised to the plaintiff a life estate in the mother's moiety of the tract, subject to the payment of the charges mentioned. In this state of the case we are bound to treat the defendants, children, as tenants in common. Joint tenancy has been abolished in this state: Section 7175, L. O. L. Tenants in common hold their interest in realty independent of each other. Neither one can do an act respecting the title which will bind the others. Even if he essays to convey the whole estate it will operate only to pass the title to his own share. His grantee becomes only a new tenant in common with the remainder of the original holders. It is true that as against a stranger one tenant in common may recover possession of the whole of the land held by himself and his cotenants, but this is because of the only unity which is an ingredient of such an estate, viz., that of possession. In the present instance no defendant is liable directly on the contract alleged in the complaint, because neither of them is a party to that stipulation. Although its validity might be thoroughly established and decreed, no single defendant is liable for either of the others on account of its breach. He can be held only for that part of the estate which came into his possession or which he acquired by descent from his ancestor. It is analogous to the situation described in Section 485, L. O. L., which says:

"The next of kin of a deceased person are liable to a suit in equity by a creditor of the estate to recover the distributive shares received out of such estate or to so much thereof as may be necessary to satisfy his debt. The suit may be against all of the next of kin jointly or against any one or more of them severally."

10. The plaintiff has a right to secure the title for which he had contracted by conveyance from such of the defendants as would convey to him and by suit against the others. Moreover, having instituted suit against all of them, he had a right to recover from such as he could, by default or by decree *pro confesso*, and it is no concern of those who thus surrendered at discretion that the others successfully resisted his demand; neither are the latter affected by the result of the litigation as to the former. Within the meaning of the latter clause of the excerpt from 16 Cyc. 497, there is no necessary connection between the defendants inconsistent with a decree in favor of some of them and against the others.

The cases cited in support of the petition for rehearing are uniformly those in which the liability sought to be enforced was joint. For example, *Frow v. De La Vega*, 15 Wall. 552 (21 L. Ed. 60), the leading case cited in support of the petition, was one where fourteen defendants were charged with conspiracy to defraud the plaintiff of certain lands. Of course, in such an instance there was a joint liability. There could be but one recovery and the release of one tortfeasor would exonerate the others. The principle does not apply here, for the defendants are each liable only *pro tanto*, if at all, without reference to either of the others, and the plaintiff may enforce his claim against any one of them as he may be able to establish it, whether by their consent or otherwise, without affecting his litigation with the others. The text-writer in 15 R. C. L. 1032, after treating of the effect of judgments against part of a number of individuals who are jointly liable according to the contention of the petition before us, uses this language respecting cotenants:

“Tenants in common are not privies, and are therefore not bound by judgments rendered in actions brought by one of their cotenants respecting the common property.”

As the estoppels of judgments are mutual, the rule is the same on the other hand, so that tenants in common cannot claim the benefit of a decree in favor of their cotenants. An illuminative case supporting the text on the relation of tenants in common to each other is *Allred v. Smith*, 135 N. C. 443 (47 S. E. 597, 65 L. R. A. 924). In that instance the maternal ancestor of the litigants had conveyed her land to one of them, G. A. Allred. After the mother's death Willie Allred instituted a suit against the grantee in the deed and succeeded in having it set aside and declared void on the ground of the mother's mental incompetence. The plaintiff in that suit afterwards joined with her other brothers and sisters in a suit against G. A. Allred to partition the land into nine equal parts, that being the number of the children in the family of the deceased grantor. After an exhaustive examination of the case the court held that the other children could claim no advantage by reason of the decree between the litigants in the suit to cancel the deed, the reason being that tenants in common were independent of each other and that neither of them could charge or estop the others, and hence neither could take advantage of anything done by the others respecting the title to the realty involved. There, as here, it was argued that as the contract by which title passed to the grantee was declared void, it was void as to everybody. The court, however, held that it was void only as to those who were engaged in contesting it.

The only concern which the executor of the will in the present instance has in relation to the real estate

is about that which does, indeed, belong to the estate of his decedent, and even then only for enough of it to pay the claims and charges against the estate after the exhaustion of personalty for that purpose. It is enough to say in that respect that he is not interested in the distribution of the realty among those entitled to claim under the will. The plaintiff is entitled to such proportion of the property as he has obtained by the *pro confesso* decree against the defendants who did not resist this suit. He is also entitled to what may come to him under the will. The remainder will descend, as provided by the will, to those of the children who successfully resisted the plaintiff's claim in this suit. The plaintiff stands in the shoes of those over whom he has prevailed.

The nonanswering defendants are not here complaining. Indeed, they are not before this court, because the notice of appeal was not served upon them. As to them he cannot, for want of jurisdiction, disturb that which they are willing should stand. We can deal only with those parties who are before us, and the successful defendants must be satisfied with the decree we have rendered. The petition for rehearing must be denied.

MODIFIED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued June 4, modified July 1, rehearing denied September 9, 1919.

DUNCAN LUMBER CO. v. WILLAPA LUMBER CO.

(182 Pac. 172; 183 Pac. 476.)

Appearance—Defects in Process—Waiver—Answer upon Merits.

1. The filing of an answer upon the merits constitutes a voluntary appearance and a waiver of any defect in the service of summons, though plea in abatement challenging jurisdiction of the person is joined with plea to the merits, notwithstanding Section 74, L. O. L., as amended by Laws of 1911, page 144.

[As to test whether appearance is special or general, see note in Ann. Cas. 1914A, 1189.]

Evidence—Written Contract—Sales—Negotiations.

2. Where written order constituted complete contract, evidence of letters and telephone conversation between the parties during the negotiations, whereby it was agreed that terms should be different from those contained in the written instrument subsequently signed, was not admissible.

Sales—Failure to Deliver—Measure of Damages.

3. The measure of damages for failure to deliver merchandise, in accordance with contract, if the articles have a market value, is the difference between the contract price and the market value at time and place of delivery.

Sales—Failure to Deliver—Damages—Purchase of Goods Elsewhere.

4. While buyer is not required to go into the market and purchase goods elsewhere before bringing his action for seller's failure to deliver, he may, if he sees fit, do so, and if in a successful effort to minimize the damage he incurs expense, he may recover such expenditures as an element of damages, so long as the total recovery does not exceed the difference between the contract price and market price.

Appeal and Error—Review—Harmless Error.

5. In buyer's action for seller's failure to deliver spruce lumber, admission of evidence as to market value of higher grade of spruce than that called for by the contract was harmless to seller, where only effect of such evidence was to explain prevailing high price of all grades of spruce.

Sales—Failure to Deliver—Extension of Time for Delivery—Evidence.

6. In buyer's action for seller's failure to deliver, evidence as to agreement to extend time for delivery held sufficient.

Sales—Failure to Deliver—Date of Breach—Evidence.

7. In buyer's action for seller's failure to deliver, where there was evidence of agreement to extend time of delivery, seller's letter to

buyer, declining to make further deliveries, was admissible to fix date of breach.

Appeal and Error—Discretion of Court—Rebuttal Testimony.

8. Discretion of court in admitting evidence designed to prove original cause of action, by plaintiff on rebuttal, is not reviewable in absence of manifest abuse.

Trial—Rebuttal Evidence—Discretion.

9. In buyer's action for seller's failure to deliver lumber, where evidence as to market value was allowed to take a wide range upon the part of both litigants, and seller introduced evidence of individual sales from June to September, court's action in permitting plaintiff, during rebuttal, to introduce evidence of three sales during months of April, August and December was not manifest abuse of discretion.

Damages—Interest—Unliquidated Claim.

10. Buyer suing seller for failure to deliver is not entitled to interest on his damages.

Trial—Instructions—Evidence.

11. Instructions directing jury to "do the best you can, according to all the evidence that has been introduced," held not subject to objection that it permitted jury to indulge in speculation in reaching verdict.

ON REHEARING.

Pleading—Inconsistent Defenses—Joining Pleas in Abatement and to Merits—Effect.

12. Section 74, L. O. L., as amended by Laws of 1911, Chapter 99, providing defendant may set forth by answer as many counterclaims as he has, including pleas in abatement, does not change the rule that defenses must be consistent, and that, where answer first denies a thing and then admits it, the latter controls; so a plea in abatement, on the ground that jurisdiction of the person had not been acquired, is overcome by a plea to the merits, in effect an allegation of general voluntary appearance.

Courts—"Jurisdiction of the Subject Matter"—How Conferred.

13. "Jurisdiction of the subject matter" means authority of the court to hear and determine the kind of case presented, is conferred by law, and lack of it, under Section 72, L. O. L., cannot be waived.

Courts—Jurisdiction of Person—How Conferred.

14. Jurisdiction of a person *sui juris* depends either on proper service of summons on him or on voluntary appearance.

Appearance—General Appearance After Special Appearance.

15. Though defendant's appearance be a special one, limited to a particular purpose, yet if he appears and offers contest on the merits of the complaint, it is a general appearance, giving jurisdiction of the person as to all matters in controversy.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

This is an action in which plaintiff seeks to recover damages for the breach of a contract. The substance of the complaint is, that the parties entered into a contract dated March 22, 1917, whereby defendant agreed to manufacture and sell to plaintiff certain spruce lumber, at an agreed price of \$42 per thousand feet, f. o. b., Chicago; that defendant was to pay the freight and pay plaintiff a commission of 5 per cent, and that the delivery was to be completed not later than May 30, 1917. It is then alleged that defendant failed and refused to deliver a large portion of the lumber, the shortage amounting to 344,483 feet; that by mutual agreement the date of delivery was extended to August 18, 1917, at which time defendant failed and refused to make further delivery. It is further averred that on August 18, 1917, and for some days subsequent thereto, the market price of spruce lumber of the kind and quality specified in the contract, at Chicago, was \$75 per thousand feet, which allegation is followed by computations showing that the difference between the contract price and the market price at that date was \$11,928.18, which plaintiff fixes as the amount of his loss. It should also be observed that the complaint further alleges that the defendant is a Washington corporation, having its principal place of business at Raymond, Washington,

“and carrying on and transacting business and sales of its products in the State of Oregon; that it has not appointed any attorney in fact or resident agent upon which service or other process may be had.”

Service of summons was made by serving it personally upon Howard Jayne, secretary of the defendant corporation, during his temporary visit to Portland.

Thereafter, defendant appeared specially, with a motion to quash the service of summons, upon the ground that the defendant was a foreign corporation, having no established agency in Oregon, and not transacting any of its business in this state. This motion was denied, and thereupon the defendant simultaneously filed a plea in abatement, and an answer to the merits. The former consisted of recitals relating to the condition of defendant as a foreign corporation, and, as in the motion to quash the service of summons, challenged the court's jurisdiction of defendant's person, as sought to be acquired by the personal service upon its secretary while he happened to be visiting Portland upon his private affairs.

The answer to the merits begins with this paragraph:

"For a further and separate answer to plaintiff's amended complaint, and pursuant to Chapter 99, General Laws of Oregon for the year 1911, and not waiving its plea in abatement hereinbefore set forth, and not giving this court jurisdiction over it, defendant for answer to plaintiff's amended complaint herein, admits, denies and alleges as follows:"

It further consists of a general denial of the allegations of the complaint, and then pleads affirmatively that on March 22, 1917, plaintiff sent from Portland to defendant at Raymond, Washington, an order for certain spruce lumber, which is the order referred to in the complaint; that defendant, by letter of April 5th, rejected the order, advising plaintiff that it could not accept it, but was willing to accept a portion of it, and buy what it could from the neighboring mills, making the best shipment possible, but that it would not make a definite promise of delivery; that on April 9th plaintiff accepted defendant's offer as contained

in its letter of April 5th, and in its letter of acceptance asked defendant to return its original order dated March 22d, being order Number 1400, for the purpose of completing its files, and that in compliance therewith, defendant returned the order; that said order of March 22d, as modified by defendant's letter of April 5th and plaintiff's letter of April 9th, constituted the agreement between the parties, and is the agreement referred to in the complaint; that such agreement did not bind defendant to manufacture, sell or deliver any specific amount of lumber at any specified time, but that defendant was willing to accept a portion of the order, but did not undertake to make delivery at any specified time. It concludes with a prayer for judgment for its costs and disbursements. A reply was filed, denying the affirmative matter of the answer, and thereafter the issues joined by the plea in abatement and reply thereto were tried by a jury, resulting in a verdict in favor of plaintiff, and then followed a trial by jury upon the merits, resulting in a verdict and judgment in favor of plaintiff for \$7,500 with interest at 6 per cent per annum from August 18, 1917, amounting to \$185 and defendant appeals.

MODIFIED.

For appellant there was a brief over the names of *Messrs. Welsh & Welsh* and *Messrs. Angell & Fisher*, with an oral argument by *Mr. Homer D. Angell*.

For respondent there was a brief and an oral argument by *Mr. J. G. Arnold*.

BENSON, J.—1. A considerable number of the assignments of error are based upon the contention that the court never acquired jurisdiction of the person of

the defendant, and all of these may be considered together. At the outset it must be observed that the defendant has filed an answer upon the merits, which, according to a long line of decisions of this court, constitutes a voluntary appearance and a waiver of any defect in the service of summons. Among these are: *Rogue River Mining Co. v. Walker*, 1 Or. 341; *Harker v. Fahie*, 2 Or. 89; *White v. North West Stage Co.*, 5 Or. 99, 102; *Kinkade v. Myers*, 17 Or. 470 (21 Pac. 557); *Belknap v. Charlton*, 25 Or. 41 (34 Pac. 758); *Fildew v. Milner*, 57 Or. 16 (109 Pac. 1092). The case of *Belknap v. Charlton*, 25 Or. 41 (34 Pac. 758), may be regarded as the leading case upon the subject in this jurisdiction, having been many times cited with approval, the latest being in *Felts v. Boyer*, 73 Or. 83 (144 Pac. 420), and *Roethler v. Cummings*, 84 Or. 442 (165 Pac. 355). In the case of *Belknap v. Charlton*, 25 Or. 41 (34 Pac. 758), Mr. Justice BEAN says:

“It is claimed by the plaintiffs that while a defendant may appear specially to object to the jurisdiction of the court over him on account of the illegal service of process (*Kinkade v. Myers*, 17 Or. 470 (21 Pac. 557)), he must keep out of court for every other purpose, and that any appearance which calls into action the power of the court for any purpose except to decide upon its own jurisdiction, is a general appearance, and waives all defects in the service of process, and many authorities are cited to sustain this position. The principle to be extracted from the decisions on this subject is, that where the defendant appears and asks some relief which can be granted only on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance by its terms be limited to a special purpose or not. * * This seems to be a reasonable rule, and one which will adequately protect the rights of the parties, and

it, determines the effect of defendant's appearance from the nature of the relief which he seeks to obtain. If he asks the court to adjudicate upon some question affecting the merits of the controversy, or for some relief which presupposes jurisdiction of the person, and which can be granted only after jurisdiction is acquired, he will be deemed to have made a general appearance, and to have submitted himself to the jurisdiction of the court, and cannot, by any act of his, limit the appearance to a special purpose."

In the present case, the defendant appears to have acted upon the theory that since the amendment of Section 74, L. O. L., General Laws of Oregon for 1911, page 144, a plea in abatement, challenging the jurisdiction of the person may be joined with a plea to the merits without effecting a waiver of defects in the service of the summons. But this does not follow. It is true, that when the defect in the service does not appear upon the face of the record, it may be called to the attention of the court by a plea in abatement, and it is also true, that in all proper cases the plea in abatement may be joined with other defenses and counterclaims in the same answer, but there is nothing in the statute which tends to neutralize the established legal effect of pleading to the merits, which is, that it is a voluntary submission to the jurisdiction of the court. From the moment that defendant filed its answer there was no further question of jurisdiction left in the case.

Turning then, to the questions arising upon the trial upon the merits, the defendant first urges that the court erred in excluding from the consideration of the jury two letters which were identified as exhibits "C" and "D" and also the substance of a telephone conversation between the secretary of the defendant and the president of the plaintiff. These three as-

signments are here grouped together for the reason that they present the same problem. The two letters, in their order, are as follows:

EXHIBIT "C."

"April 5, 1917.

"Duncan Lumber Co.,
"Northwestern Bank Bldg.,
"Portland, Oregon.

"Gentlemen:—

"We are in receipt of yours of the 3rd inst. requesting return of blue sheet acknowledgment of your order #1400. This order came into the office during the writer's absence in the east. Last week he called at your office and talked with Mr. Duncan regarding date of shipment mentioned in your letter.

"In the first place we wish to state we cannot accept this order as it stands and complete shipment before next fall. We are willing to accept a portion of it and buy what we can from neighboring mills, making the best shipment possible, but we are not willing to go on record with a definite promise of delivery.

"We wish you would call us by phone and talk this matter over with us or write us fully how you wish us to handle it.

"Yours very truly,

"WILLAPA LUMBER COMPANY.

"JAYNE,

"Secretary."

EXHIBIT "D."

"April 9, 1917.

"File: Order #1400.
"Willapa Lumber Company,
"Raymond, Washington.

"Gentlemen:

"Attention Howard Jayne, Sec.

"Referring to your letter of April 5th, and confirming phone conversation, kindly let us have return acknowledgment of our order above numbered to complete our files and please do all that you possibly can toward getting this material ready for shipment. As

soon as you have any of this material ready for loading, order car, showing on the face of your car order:

“ ‘Material for the Construction of System Cars—
Order Duncan Lumber Company ’

and send us a copy of this car order and we will give the matter of having equipment placed at your plant, immediate attention.

“I hope that you will give this order the vigorous attention that it demands, and with best wishes, remain

“Yours very truly,

“DUNCAN LUMBER COMPANY.

“G. M. DUNCAN,

“President.

“Cars furnished as above must not be diverted to other loadings.”

In regard to the telephone conversation, which was excluded, the defendant’s secretary, Jayne, was permitted to testify as follows:

“Well, as I understood, it was practically agreed between us that we were to furnish what we could and buy from neighboring mills when we could, and Mr. Duncan was to buy the rest outside. That is the reason I signed the order.”

The order, which was signed by Jayne after the exchange of the foregoing correspondence, and after the telephone conversation above referred to, and which is the foundation of plaintiff’s action, reads as follows:

“#1400.

“Portland, Oregon, Mar. 22nd, 1917.

“To Willapa Lumber Company, Raymond, Wash.

“Ship to Duncan Lumber Company, Minnesota Transfer, Minn.

“Route — N. P.

“It is understood, unless otherwise specified, that all lumber shipped on this order will conform to the standard classification, grading and dressing rules adopted by the West Coast Lumber Manufacturers’

Association and is guaranteed not to exceed Association weights.

"Load all cars to capacity in accordance with railway tariffs governing, and make proper notation on Bill of Lading to protect actual weight of contents. Any excess freight charges resulting through your failure to do this will be for your account.

"Prices attached are f. o. b. cars Pullman, Ill.

"Terms—Regular. (Prices include 5% commission to us.)

B. & B. tr. Spruce Refrigerator Car Lining Strips, Kiln Dried \$42.00

6,500 ft.	1x6"—	5'	S 2 S	to 13/16",	edges rough.
7,000 "	"	9'		do.	
19,500 "	"	14'		"	

B. & B. tr. Spruce Refrigerator Car Lining, Kiln Dried, \$42.00.

39,000 ft.	1x6"—	5'	S 2 S T & G	to 13/16x5 1/8",	face.
12,500 "	"	6' 6"		do.	
91,000 "	"	9'		"	
16,000 "	"	12'		"	
128,000 "	"	14'		"	
112,000 "	"	16'		"	

As per Sketch 'C' B/P #114-1400.

"Shipment: Commence promptly and complete by May 15th, to 30th, 1917.

"Note: When ordering cars show on requisition 'Material for Duncan Lumber Co. for construction Northern Pacific System Refrigerator Cars—final destination Pullman, Ill.,' and send us copy of your car order. Special arrangements will be made to furnish cars promptly when so ordered.

"Confirming phone conversation with Mr. Jayne.

"This order accepted and will be shipped.

"WILLAPA LUMBER CO.

"By JAYNE.

"Our Order #1400.

"Sign and return to us at Portland."

2. It is the contention of the defendant, as disclosed in its answer and in the argument upon this appeal, that the true contract between the parties is to be found in the two letters and the foregoing order. Neither fraud nor mistake is alleged. An inspection

of the order discloses that it is, on its face, a complete contract. It does not appear that any necessary detail is omitted which should be supplied, nor is it contended by the defendant that the letters and telephone conversation supply additional details, but that they modify the terms thereof. In other words, defendant seeks, by these offers, to establish, by evidence *dehors* the contract, that prior to its execution there were negotiations wherein it was agreed that the terms of the contract, both as to quantity of material and as to time of delivery, should be different from those expressed in the instrument subsequently signed by the defendant. That this cannot be done, is so clearly taught in *Sund & Co. v. Flagg & Standifer Co.*, 86 Or. 289 (168 Pac. 300), that it requires no further comment. The evidence was properly excluded.

3, 4. It is then urged that error resulted from the action of the court in admitting evidence of the expense incurred by the plaintiff in purchasing lumber elsewhere, after plaintiff's failure to deliver the same. It is the settled law of this state, as conceded by the parties hereto, that the measure of damages for failure to deliver merchandise, in accordance with a contract of purchase, if the articles have a market value, is the difference between the contract price and the market value at the time and place of delivery. But there is another doctrine, equally well founded, to the effect that while the purchaser is not required to go into the market and purchase the goods elsewhere before bringing his action, he may, if he see fit, do so, and if, in a successful effort to minimize the damage, he incurs expense, he is entitled to recover such expenditures as an element of damages, so long as the total recovery does not exceed the difference between the contract price and the market price of the mer-

chandise which the defendant failed to deliver in accordance with the terms of his agreement: 8 R. C. L. 450. In the present case the trial court submitted such evidence to the jury under the following instruction:

"You are further instructed, however, that if you also find that plaintiff in this case was able to buy some or all of the lumber not delivered under the contract at less than the market value, then you are to allow the plaintiff as damages only the amount of its actual loss; that is, the difference between the contract price and the price plaintiff had to pay to replace the order; * * but in that case you must also take into consideration and compensate plaintiff for the necessary and reasonable expenses plaintiff was obliged to incur for salaries and railroad fares of employees, and telegrams and telephone charges in connection with replacing the order, as alleged in plaintiff's complaint, and not to exceed the amount stated in said complaint. But you must bear in mind that the total damages which you may allow in any event for any lumber not delivered under the contract must not exceed the difference between the contract price and the market value at the time of the breach at the place of delivery, * * nor shall such damages exceed the amount demanded in the complaint."

There was evidence submitted to the jury to the effect that the market value at the time of the breach, at the place of delivery was \$75 per thousand feet, but that plaintiff purchased some of it at \$61 and \$66 and that the total loss to plaintiff, exclusive of his expenses, was reduced to \$7,520.27, while at the market value, it would have amounted to \$11,928.18. In this state of the record, it was not error to admit the evidence of which complaint is made.

It is urged that it was error to permit two of plaintiff's witnesses to testify that at the time of the alleged

breach, which according to plaintiff's contention, was August 17, 1917, airplane spruce had a market value of \$105 per thousand feet; that the spruce which plaintiff purchased was not airplane spruce, but was an inferior and cheaper grade of material. The answer of the witness Duncan upon this subject was:

"The prevailing market at that time on airplane spruce was established at \$105 per thousand feet, and naturally in establishing the price for airplane spruce, that had something to do in establishing the market on all spruce."

The witness Shaw testified thus:

"Q. Mr. Shaw, I will ask you if you boys had difficulty to purchase spruce?"

"A. Yes, sir. On my first trip to the Harbor I took this spruce up with every mill whose manager was at home at that time, and was unable to buy any of it at any price. The answer that I got to my request for shipment of the spruce was that they could not cut it without going into their airplane stock; consequently they couldn't furnish it except at practically airplane prices."

"Q. And what were those prices?"

"A. The price at that time was \$105 for airplane material."

5. Defendant moved to strike this out, as immaterial and irrelevant, which was denied. The manifest effect of this evidence went no further than to explain the prevailing high price of all grades of spruce, and therefore could have worked no harm to defendant.

6, 7. Our attention is also directed to the fact that the alleged contract upon which plaintiff stands, fixes May 30th as the final date of delivery, and it is insisted that there is a total failure of proof of any agreement to extend the time of performance, and that therefore it was error to admit evidence of the market

value of the material at any other date. The only evidence upon this subject is that of the witness Duncan, who says that after shipments under the order should have been moving, but were not moving, he was in frequent communication with defendant in regard to the delays and urging delivery, receiving promises which were not fulfilled, and finally on August 18, 1917, he received a letter from defendant notifying plaintiff that no more material would be delivered. It also appears that the last delivery was made on July 9th. While the testimony of Duncan is somewhat vague and general in its nature, when it is taken in connection with the fact that a delivery was made on July 9th, and accepted, we are obliged to conclude that there is evidence, in the acts of the parties, of an agreement to extend the time of delivery, and the fact that a letter was written by defendant on August 17th, declining to make further deliveries was properly submitted to the jury in fixing the date of the breach.

Complaint is made that the court erred in permitting the plaintiff, upon rebuttal, to introduce evidence of three individual sales of similar lumber to other parties, in the months of April, August and December respectively, at the price of \$75 per thousand feet. It is urged that this evidence was not properly evidence in rebuttal, and that the dates do not correspond with the date of the alleged breach of the contract, and that such evidence was therefore incompetent.

8, 9. An examination of the record discloses that the defendant offered evidence of individual sales over a period of time ranging from June 11th to September 1st, and the evidence referred to in the assignment of error was offered to meet the same. It is true that the evidence was designed to prove the original cause

of action, and was not properly in rebuttal, and so the action of the court amounted to a reopening of the case for plaintiff. This is a procedure regulated by the sound discretion of the trial court, and not reviewable here in the absence of manifest abuse, which we do not discover. The evidence upon the subject of market value was allowed to take a wide range upon the part of both litigants, but throughout the entire trial the value at the date of the breach was emphasized, so that we think the jury was not misled thereby. Indeed, the verdict is for a sum slightly less than the amount which witnesses for plaintiff testified was actually paid for the material in replacing the order in August.

It is also contended that the court erred in permitting the plaintiff, during the trial, to amend its complaint by adding thereto a demand for interest, and submitting to the jury the question of interest. This question is settled beyond further discussion in this state, in favor of defendant's position. The subject is very fully discussed in *Sargent v. American Bank & Trust Co.*, 80 Or. 16, 42 (154 Pac. 759, 156 Pac. 431).

Our attention is called to what defendant insists is an erroneous instruction given by the court as follows:

"Now, the first question for you to determine is whether or not there was a breach of the alleged agreement between the parties. If you find that there was a breach, then the next question for you to determine would be the amount which you would allow, if any, would be such as you would agree upon according to the evidence introduced in this case.

"Now, it will be impossible for you to arrive at the amount, if you have occasion to estimate it, with mathematical accuracy. Simply do the best you can, according to all the evidence that has been introduced, and allow some sum, anywhere from one cent up to the

full amount claimed by the plaintiff, if you allow anything."

Defendant argues that it assumes that there is a contract to be breached, and that this is one of the crucial questions in the case. This contention is disposed of already, in the consideration of defendant's offer of evidence relating to negotiations prior to signing the order upon which plaintiff relies.

11. It is also urged that this instruction permits the jury to indulge in speculation in reaching the verdict, but in directing the jury to do the best they can, "according to all the evidence that has been introduced," the charge clearly limits their consideration to the evidence submitted and is not vulnerable to the criticism aimed thereat.

The error in submitting the allowance of interest to the consideration of the jury, is simplified by the fact that the verdict segregates the interest, fixing it in the sum of \$185. The judgment will therefore be modified by eliminating the sum of \$185, awarded as interest, and the judgment is otherwise affirmed.

MODIFIED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Denied September 9, 1919.

PETITION FOR REHEARING.

(183 Pac. 476.)

Messrs. Welsh & Welsh and Messrs. Angell & Fisher, for the petition.

Mr. J. G. Arnold, contra.

BURNETT, J.—By its petition for a rehearing the defendant urges that this court was wrong in the conclusion that having answered to the merits of the controversy between the parties and gone to trial on the issues so raised after having been defeated on the trial of its plea in abatement, the latter defense was waived. Section 74, L. O. L., as amended by Chapter 99, Laws of 1911, and as finally changed by Chapter 8, Laws of 1915, reads thus:

“The counterclaim mentioned in Section 73 must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

“(1) A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff’s claim.

“(2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

“The defendant may set forth by answer as many counterclaims as he may have, including pleas in abatement. Such defenses shall each be separately stated and shall refer to the causes of action which they are intended to answer, in such manner that they may be intelligently distinguished; *provided*, that the defendant shall not be required to admit in his answer any liability or indebtedness to the plaintiff in order to be permitted to plead a counterclaim.”

The defendant relies upon the clause,

“The defendant may set forth by answer as many counterclaims as he may have, including pleas in abatement.”

It maintains that this is a warrant for joining in one answer all manner of pleas and defenses and concludes that in no case can waiver of any plea be predicated on such joinder.

12. Conceding that the legislature made a new rule of pleading as to the matters that may be set forth in an answer, it did not undertake to construe the legal effect of what any defendant should put into that pleading. The statute does not dispense with the common-sense rule that the different defenses must not be inconsistent with each other and particularly that where a defendant by his answer first denies a thing and then further on in the pleading admits the same thing, the admission will control and the denial will be disregarded: *Veasey v. Humphreys*, 27 Or. 515 (41 Pac. 8); *Maxwell v. Bolles*, 28 Or. 1 (41 Pac. 661); *Brown v. Feldwert*, 46 Or. 363 (80 Pac. 414); *Dutro v. Ladd*, 50 Or. 120 (91 Pac. 459); *Johnson v. Sheridan Lumber Co.*, 51 Or. 35 (93 Pac. 470); *Peters v. Queen City Ins. Co.*, 63 Or. 382 (126 Pac. 1005).

In the instant case the effect of the defendant's pleading is for it to say in one breath, "the court has not acquired jurisdiction of my person," and in the other to declare, "the court has jurisdiction of my person, seeing that I am here voluntarily defending on the merits of the case." The defendant was either in court or it was not in court. Both could not be true at the same time and the admission to be drawn as a legal conclusion from its general answer that it is in court must prevail over its contention in the plea in abatement that it is not in court.

13-15. Jurisdiction is of the person and of the subject matter. The matter means the authority of the court to hear and determine the kind of case presented and is conferred by law independent of the act or consent of the parties. The lack of this element of jurisdiction is never waived but may be urged at any time during the progress of the litigation: Section 72, L. O. L., and authorities cited in note. On the other

hand, jurisdiction of a person *sui juris* depends either upon proper service of summons upon him or upon his voluntary appearance in court. Indeed, his appearance may be a special one limited to a particular purpose but if he appears and offers contest on the merits of the complaint it is universally held to be a general appearance giving the court sanction to hear and determine all the matters in controversy, providing of course that the court has authority in law over the kind of case presented.

In substance, plainly stated, the defendant's position as disclosed by its pleading is that it is in court by its own consent, but was not brought in by service of summons. Being in court generally of its own volition is an admission of the court's jurisdiction over its person which must prevail over its denial of jurisdiction embodied in its plea in abatement.

The petition for rehearing is denied.

MODIFIED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued November 13, 1918, affirmed January 7, 1919.

STATE v. BERTSCHINGER.

(177 Pac. 63.)

Criminal Law—Time of Trial—Congested Docket—Absent Witness.

1. Indictment returned in September will not be dismissed for failure to set case for trial during October term, to which it had been postponed on oral stipulation, due to congested condition of docket; and where motion to dismiss was not filed until accused had received notice that trial was set for December, and there was no showing that he was unprepared because of absence of witness, or who witness was, whether he was out of jurisdiction, and what he would testify.

[As to general principles controlling absence of witnesses as ground for continuance, see note in 122 Am. St. Rep. 745.]

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2.

On June 1, 1917, the defendant was indicted by the grand jury of Multnomah County for the crime of manslaughter in the commission of an abortion upon a Mrs. Oswald. The defendant entered a plea of not guilty and the case was set for trial on September 12, 1917. A few days previous to that date the district attorney and defendant's counsel made an oral agreement that the trial of the case should be postponed until the October term, 1917. Nothing more was done and the case was finally set for hearing on December 14, 1917. Defendant's attorneys claim that they did not receive any notice of the trial of the case on that date until December 11, 1917. They also claim that they consented to the postponement of the trial to the October term "upon the condition that the case would be called and tried in the early part of October."

After receiving notice on December 11th that the case was set for trial three days later, the defendant then filed a motion to dismiss the indictment, "upon the ground that the district attorney had not brought the defendant to trial at the next term of court after the finding of the indictment." This motion was based upon the records of the court, the affidavits of the defendant and of his attorneys. A counter-affidavit was filed by the deputy district attorney, together with a reply affidavit of one of the defendant's attorneys; all of which affidavits are in the transcript. After argument, the motion to dismiss was overruled and the order overruling it recites:

"And it appearing to the court after hearing the argument and statements of counsel *pro* and *con*, from the affidavits of respective counsel now on file herein.

and from the condition of the trial docket of this court, and from the statements of respective counsel, that good cause and reasons exist for the denial of the above-named defendant's motion to dismiss the indictment herein for the failure to try the defendant at the next term after he was indicted;

"Now, therefore, it is hereby ordered and adjudged that the defendant's motion to dismiss the indictment herein be and the same hereby is denied."

From this ruling the defendant appeals.

AFFIRMED.

For appellant there was a brief filed over the names of *Mr. John J. Fitzgerald* and *Mr. Julius N. Hart*.

For the State there was a brief over the names of *Mr. Walter H. Evans*, District Attorney, and *Mr. Charles C. Hindman*, Deputy District Attorney, and *Mr. J. L. Hammersly*, with an oral argument by *Mr. Hammersly*.

JOHNS, J.—This case is the usual result of oral stipulations between counsel about which the court is not consulted and which it has not approved, and of the setting of trial without ample notice to opposing counsel. Yet we are convinced that the office of the district attorney acted in good faith and that any apparent delay in the trial of the case was not through the fault of that office. The record shows that the real cause of the delay was the congested condition of the trial docket and that this case was actually set for trial on the first open date.

While the defendant's motion to have the indictment dismissed is upon the alleged failure of the state to have the trial set for the October term of court, yet it is very significant that the motion to dismiss was not filed until after his counsel had received notice that the

trial was set for December 14, 1917, and that he claims he was not ready for trial then for the reason that he could not obtain the attendance of an important witness. There is no showing as to who the witness was, whether or not he was out of the jurisdiction of the court, when he had left or whether he would ever return, what he would testify to if present, or what effort, if any, had been made to locate the witness. The defendant is placed in the untenable position of complaining because he did not have his trial at the October term, and objecting to his trial in December on the ground that he was not then ready for trial. There is no merit in the motion to dismiss, and the ruling of the Circuit Court is affirmed.

AFFIRMED.

BEAN, BENSON and BURNETT, JJ., concur.

Original proceedings in disbarment, submitted on motion to strike petition January 23, overruled February 6, 1917.

STATE ex REL. v. GREENFIELD.

(162 Pac. 858.)

Attorney and Client—Disbarment Proceedings—Petition—Sufficiency.

1. The mere fact that a petition for disbarment of an attorney was entitled "In the Supreme Court of the State of Oregon in and for Multnomah County" did not invalidate it, but the addition of the words naming the county was a clerical error, and could not mislead defendant.

Attorney and Client—Disbarment Proceedings—Petition—Sufficiency.

2. Since a proceeding for disbarment is neither civil nor criminal, and is governed by its own rules and not by those governing complaints in civil actions or criminal proceedings unless the statute has made them applicable and there is no requirement that the complaint be verified, the court will merely require such verification as assures good faith.

Attorney and Client—Disbarment Proceedings—Petition—Sufficiency.

3. In a proceeding for disbarment of an attorney, a verification made on affidavits of an attorney, who deposed that he was attorney

for petitioners and was one of the petitioners himself and a member of the bar association, is technically sufficient.

Attorney and Client—Disbarment Proceedings—Technical Accuracy.

4. In disbarment proceedings, the court will look to the substance of the charge rather than the technical accuracy with which it is presented.

Original proceedings in disbarment.

In Banc.

On motion to strike petition. **MOTION OVERRULED.**

Mr. J. R. Greenfield, for the motion.

Mr. E. L. McDougal, *contra*.

PER CURIAM.—1. This is a proceeding to disbar the defendant for alleged misconduct. Defendant moves to strike the petition from the files for the reasons: (1) That it is entitled, “In the Supreme Court of the State of Oregon in and for Multnomah County”; (2) that it is not properly verified. As to the first objection it is plain that the error is merely clerical, and the objection frivolous. The addition of the words “In and for Multnomah County” to the title evidently could not and did not mislead defendant.

2. As to the verification it may be said that a proceeding to disbar an attorney is special in its nature. It is not a civil action nor a criminal proceeding, but on account of the serious consequences which may ensue from a conviction it may be termed a *quasi*-criminal proceeding. It is governed by its own rules, and neither the statutory provisions in regard to complaints in civil actions nor indictments in criminal proceedings apply to it, except in so far as the statute has made them applicable. There is nothing in the statute itself that requires the complaint to be verified, but

observing an analogy to civil proceedings this court will require such verification as will assure it that the complaint is *bona fide*, and will not act upon a complaint which is unverified.

3. The verification is made in this proceeding by the affidavit of E. L. McDougal, who deposes that he is attorney for the petitioners and that the petition is true as he verily believes. The petition itself states that the petitioners, Roscoe C. Nelson, C. L. Whealdon, Arthur I. Moulton, Bartlett Cole, Ben C. Dey and E. L. McDougal are duly admitted practicing attorneys, practicing in the City of Portland, and are members of the grievance committee and counselor, respectively, of the Multnomah County Bar Association, and are the duly authorized representatives of such association. These gentlemen are the real complainants, and E. L. McDougal is one of them. Considering the verification in connection with the allegations of the petition verified, we think it technically sufficient.

4. In these proceedings the court will look rather to the substance of the charge than to the technical accuracy with which it is presented. If it states facts sufficient to constitute a violation of the duties of an attorney with sufficient accuracy to enable the accused to know what is charged against him and to prepare his defense, we are not inclined to dispose of the case upon mere technical objection to matters of form.

The motion will be overruled and the defendant given ten days within which to answer.

MOTION OVERRULED.

Argued on motions to dismiss appeal, for an injunction and for citation for contempt, January 10, denied January 21, appeal dismissed on motion of appellant, February 14, 1919.

HELMS GROOVER & DUBBER CO. v. COPENHAGEN.

(177 Pac. 935.)

Appeal and Error—Undertaking.

1. An undertaking on appeal to satisfy the decree, if affirmed, and to deliver certain personal property, *held* to comply with Section 551, subdivisions 1 and 3, L. O. L., and not to limit the security to a specific amount.

Appeal and Error—Corrections in Record—Where Made.

2. If there is any error in the orders of the trial court as entered in the record, application for a correction thereof should be made in the trial court and not the appellate court.

Appeal and Error—Jurisdiction of Trial Court—Corrections of Errors.

3. As a general rule, the pendency of an appeal does not divest the trial court of the power to correct its record so as to conform to the truth and truly set forth the proceedings as they actually occurred.

Appeal and Error—Stay of Proceedings—Revocation of Order.

4. A notation on an undertaking on appeal, "Bond is hereby approved without affecting decree or changing same in any way," did not revoke an order staying proceedings, made after delivery of the decree.

Appeal and Error—Effect of Appeal on Writ of Error.

5. According to the common law, a writ of error operated *per se* as a supersedeas and prevented the issuance of execution to enforce the judgment, and the same effect was also given to an appeal in chancery.

Appeal and Error—Stay of Proceedings—Effect of Appeal.

6. An appeal from a decree granting a prohibitory injunction which is self-executing and requires no affirmative action, merely maintaining the *status quo* pending the appeal, does not suspend the injunction, but a mandatory injunction compelling affirmative action cannot be enforced pending a duly perfected appeal.

Appeal and Error—Stay of Proceedings—Power of Courts.

7. It is the general rule that either the lower or appellate courts, according to the circumstances, have inherent power to grant a stay of proceedings pending an appeal, even where there is no statute entitling a party to such stay; but, where there is a statute, its conditions must be complied with.

Appeal and Error—Undertaking on Appeal—Care of Personal Property.

8. In a suit involving patented machines, it was appropriate for the trial court to impose the condition that the defendants give an undertaking on appeal and continue to operate the machines; it being better for all concerned that the operation thereof should not cease during the litigation.

Appeal and Error—Jurisdiction—Supreme Court—Injunction.

9. Notwithstanding Article VII, Section 2, of the Constitution, and Section 6 prior to amendment in 1910, the Supreme Court in order to preserve the subject matter of an appeal pending a hearing on the merits, may issue a restraining order to aid or protect its appellate jurisdiction.

Appeal and Error—Care of Property Pending Appeal.

10. Where the trial court has made temporary provision for the care and management of personal property pending appeal, the Supreme Court will not ignore or lightly disturb the order.

Appeal and Error—Supersedeas—Contempt.

11. When an appeal is taken from an order granting a prohibitory injunction, the trial court still retains jurisdiction pending the appeal to punish, as a contempt, the violation of the injunction; the contempt proceedings being wholly independent of the appeal.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

In Banc.

A decree was entered in the Circuit Court in the above-entitled case on the eighteenth day of October, 1918, whereby it was decreed that a certain contract between the plaintiff and defendants be rescinded and annulled. It was further ordered that the defendants be restrained and enjoined from the further use or control of an invention known as the "Helms Groover and Dubber" and described in the application filed in the United States patent office, September 22, 1917, and enjoining the defendants from the further manufacture or sale of said invention, and from making any contracts therefor; and also ordered:

"The defendants to turn over to the plaintiff within five days from this date, all machines known as the 'Helms Groover and Dubber' which had been purchased or in any way acquired out of the proceeds of

the business conducted by the said defendants in connection with the aforesaid contract from the time the same was entered into to date hereof."

It appears by the original contract between the plaintiff and defendants, which was rescinded by the decree, that the Copenhagen Brothers agreed to take over this patent, manufacture, sell and operate the machines and divide the profits with the plaintiff. On account of an alleged violation of the contract, the same was rescinded.

On the twenty-first day of October, 1918, defendants filed a notice of appeal to this court. On the same date, the defendants obtained an order of the court:

"That the defendants shall have the right pending the final determination of this cause in the appellate court to operate sixteen (16) machines known as the Helms Groover and Dubber machines, but no more, and that as a condition to said operation they shall file a bond in favor of the plaintiff in the sum of Ten Thousand (\$10,000) Dollars."

Thereafter, the defendants filed two separate undertakings on appeal to which objections were made and sustained by the court. On November 7, 1918, defendants filed an undertaking on appeal with the United States Fidelity and Deposit Company as surety thereon. The court approved the undertaking in the following language:

"Bond is hereby approved without affecting decree or changing same in any way, November 7, 1918."

By an order dated November 8, 1918, the court made a formal order approving the undertaking and declaring it "to be in the aggregate amount fixed by the court for the performance of the several obligations therein."

MOTIONS DENIED.

Mr. Thomas Mannix and Mr. George Arthur Brown,
for the motions.

Mr. Alfred P. Dobson and Mr. Robert Krims, contra.

BEAN, J.—The plaintiff moves the court for a dismissal of the appeal for the reason that the undertaking is limited in the sum of ten thousand (\$10,000) dollars; and also asks that defendants be restrained from further operating the machines.

After the formal part of the undertaking in question—

It first provides that the defendants and their surety, “do hereby jointly and severally undertake and promise on the part of said defendants and appellants that defendants and appellants will pay to the plaintiff all damages, costs and disbursements which may be awarded it on said appeal, and further that said defendants and appellants will satisfy said decree or judgment so far as it may be affirmed on appeal if the same or any part thereof be affirmed on appeal.”

This portion of the undertaking is in strict compliance with Section 551, subdivision 1, L. O. L. It is not limited.

The undertaking further provides that

“Said principals and surety do further jointly and severally undertake and promise on the part of said defendants and appellants in the sum of \$10,000; that the said defendants and appellants will obey the decree of the appellate court as to the transfer or delivery of any of the personal property required to be transferred or delivered and will render such an account and pay such sums for the continued operation, pending the appeal, of the said personal property as may be decreed, ordered, or adjudged by the appellate court.”

Subdivision 3 of Section 551, L. O. L., directs as follows:

"If the decree appealed from require the transfer or delivery of any personal property, unless the things required to be transferred or delivered be brought into court, or placed in the custody of such officer or receiver as the court may appoint, that the appellant will obey the decree of the appellate court. The amount of such undertaking shall be specified therein, and be fixed by the court or judge thereof."

1. The undertaking approved by the court is substantially the same in form as the two prior undertakings which were tendered and rejected. No objection appears to have been made to the form of either of the undertakings, but only to the surety on the first two. The further undertaking above quoted appears to be in compliance with subdivision 3 of Section 551 as well as with the order of the court relating to the use of the machines. This subdivision, it will be noticed, directs the court to fix the amount of the undertaking, which amount must be specified therein. We fail to see any defect in this undertaking or any provision that in any way conflicts with the requirements of Section 551. The decree provided for the transfer of certain personal property, and it was therefore appropriate for the trial court to fix the amount of such further undertaking pursuant to subdivision 3.

Some objection is made for the reason that counsel for plaintiff were not present on October 21, 1918, when the court made the order fixing the amount of the undertaking, and limiting the operation of the machines. The order recites that the plaintiff appeared by its attorneys George Arthur Brown and Thomas Mannix, and the defendants appeared by their attorneys Robert Krims and Roscoe R. Johnson, and that it appeared to the court:

“That the defendants have heretofore filed a notice of appeal and it having been agreed upon in open court by and between the attorneys for the respective parties that the defendants should operate only sixteen (16) of the machines known as ‘Helms Groover and Dubber’ machines and no more pending the determination of this cause upon appeal.”

2, 3. If there is any error in the orders of the court, as entered in the record, a correction thereof should be made upon proper application therefor in the trial court. An appeal does not deprive the trial court of all power to act pending the appeal. As a general rule, the pendency of an appeal does not divest the trial court of the power to correct its record so it will conform to the truth, and truly set forth the proceedings as they actually occurred: 2 R. C. L., § 95, p. 120; *Pach v. Geoffroy*, 65 Hun, 619 (19 N. Y. Supp. 583). In 1 Joyce on Injunctions, Section 72, the author states:

“Pending appeal by defendant from a judgment and enjoining the operation of certain machinery on certain premises, it is in the discretion of the trial court to stay enforcement of the judgment. * * ”

4. The notation made by the trial court upon the undertaking at the time of its approval did not revoke the order of October 21, 1918, regulating the stay of proceedings. The motion to dismiss the appeal is not well grounded, and is denied.

INJUNCTION.

Plaintiff moves the court for an order restraining the defendants from operating the machines contrary to the decree.

5, 6. According to the common law, a writ of error operated *per se* as a *supersedeas* and prevented the issuance of execution to enforce the judgment, and the

same effect was also given to an appeal in chancery. This matter is now governed by statutory provisions which, as a general rule, expressly prescribe what judgments, orders or decrees may be superseded, and upon what conditions. As a general rule, proceedings upon any appealable judgment or order, except in a few enumerated cases, may be superseded upon the filing of a sufficient undertaking. Ordinarily the perfecting of an appeal from a judgment, decree or order stays only affirmative proceedings thereunder. An appeal from a decree granting a prohibitory injunction, which is self-executing and requires no affirmative action, merely maintaining the *status quo* pending the appeal, does not suspend the injunction. On the other hand a mandatory injunction, that is, one which compels affirmative action by the defendant instead of merely preserving the *status quo*, cannot be enforced pending a duly perfected appeal: 2 R. C. L., § 97, p. 122; 22 Cyc. 1010. See, also, *Day v. Holland*, 15 Or. 464 (15 Pac. 855); *Toy v. Gong*, 87 Or. 454 (170 Pac. 936); 3 C. J., § 1392, p. 1272, et seq.

7, 8. It is the general rule that either the lower or appellate court, according to the circumstances, has inherent power to grant a stay of proceedings pending an appeal even where there is no statute entitling a party to such stay. Where the right to a stay is entirely regulated by statute, or where the statute prescribes the conditions upon which it may be obtained or allowed, the courts cannot grant a stay of proceedings in a case which is not within the statute, or in the absence of compliance with the prescribed conditions: 3 C. J., § 1408, p. 1286; and also § 1410, p. 1289. In the case at bar, the defendants having complied with the conditions of the statute in regard to the undertaking on appeal, it was appropriate for the trial court,

in the exercise of its discretion, to regulate the matter of operating the patented machines involved, and to impose the condition that the defendants give the undertaking, which requirement is in part, supplemental to and in aid of the provisions of the statute. The machines are used in shipbuilding, and it would seem better for all concerned that the operation thereof should not cease during the litigation.

9, 10. Although the Constitution of Oregon, Article VII, Section 2, and Section 6 prior to the amendment of Article VII in 1910, confers upon the Supreme Court jurisdiction only to review the decisions of the Circuit Courts, except that it may in its decision take original jurisdiction in *mandamus*, *quo warranto* and *habeas corpus* proceedings, yet in order to preserve the subject matter of the appeal pending a hearing upon the merits, this court may issue a restraining order to aid or protect its appellate jurisdiction: *Livesley v. Krebs Hop Co.*, 57 Or. 352 (97 Pac. 718, 107 Pac. 460, 112 Pac. 1). However, where the trial court has made temporary provision for the care and management of personal property involved in the case, during the pendency of the appeal, the necessity for an order to protect or preserve the property which is the subject matter of the appeal is obviated. Under such circumstances, this court will not ignore or disturb the order of the trial court regulating the stay of the proceedings. When the trial court has thus exercised its discretion, particularly when the order is based upon a stipulation of counsel for the respective parties, the appellate court will be loath to disturb such an order: 22 Cyc. 970-1002. The order regulating the use of the machines was made prior to the perfection of the appeal and while the trial court has full jurisdiction of the

cause: See Ency. of Pl. & Pr., p. 1231d, and notes on p. 1232. The motion for a restraining order is denied.

APPLICATION FOR CITATION FOR CONTEMPT.

11. The plaintiff moves that the defendants be cited for contempt for a violation of the decree of the lower court appealed from. If there has been any violation of any part of the decree which was not stayed by virtue of the undertaking on appeal, or by the order of the trial court, the proper forum for an investigation of that matter is in that court. The decree in this case grants an injunction which is prohibitory and also mandatory.

When an appeal is taken from an order granting a prohibitory injunction, the trial court still retains jurisdiction pending the appeal to punish as a contempt, the violation of the injunction, as the contempt proceedings is wholly independent of the appeal, or any question to be considered by the appellate court: *Barnes v. Chicago Typographical Union*, 232 Ill. 402 (83 N. E. 932, 122 Am. St. Rep. 129, 14 L. R. A. (N. S.) 1150, and note); 3 C. J., § 1456, p. 1325.

We find no precedent in this state for this court to grant the application on account of a violation of an order of the lower court. The application for the citation is therefore denied. The opinion in *Re Vinton*, 65 Or. 422 (132 Pac. 1165), is instructive in regard to both features of this phase of the case: See, also, *State ex rel. v. Downing*, 40 Or. 309-326 (56 Pac. 863, 66 Pac. 917).

MOTIONS DENIED.

BURNETT and JOHNS, JJ., not sitting.

Appeal dismissed on motion of appellant February 14, 1919.

REPORTER.

Argued June 19, affirmed September 9, 1919.

PAULSON v. HURLBURT, SHERIFF.

(183 Pac. 937.)

Homestead—When Owner of Homestead Erecting House Thereon and Entering It can Claim Exemption.

1. Under Section 221, L. O. L., declaring family homestead exempt from judicial sale for satisfaction of any judgment, and requiring only that it must be the actual abode of, and owned by, such family, or a member thereof, and Section 224, providing that when an officer shall levy on it the owner may notify him that he claims it as his homestead, the owner of land, a member of a family, contracting for erection of a house thereon, while living with her family on rented premises, but moving into the house before foreclosure of liens for labor and material entering into it, may claim exemption against execution on foreclosure decree, having done nothing to lose or waive homestead right.

[As to common-law rule for exemption of proceeds of homestead, see note in 45 Am. St. Rep. 237.]

Homestead—Right to Claim Against Deed in Fact a Mortgage.

2. One's right to claim homestead exemption is not affected by her executing an instrument on its face an absolute conveyance of the property; it being accompanied by a defeasance in writing showing it was a security as to certain claims, and so constituted a mortgage, not divesting title from grantor.

Homestead—Exemption Statute Applying to Decrees not Affected by Codification.

3. The homestead exemption statute does not lose its natural effect, standing by itself, as a remedial statute, of applying to decrees, though in terms exempting from judicial sale for satisfaction of any judgment, because put in Sections 221-226, L. O. L., while Section 415 provides that Sections 213-220, which apply to the constituent elements of executions, and Sections 227-258, which cover exemptions as they were codified before enactment of the homestead statute, shall apply to enforcement of a decree, so far as its nature may require or admit of it.

Homestead—Exemption Statute Becomes Part of Contract for Building Dwelling.

4. The homestead exemption statute, Sections 221-226, L. O. L., existing when contract for erection of a dwelling is made, enters into it, and so makes it part of the contract that exemption may be claimed against execution on decree foreclosing lien for labor and material entering into the building.

JOHNS, J., dissenting.

From Multnomah: ROBERT TUCKER, Judge.

Department 2.

The defendant Hurlburt is sheriff of Multnomah County. The plaintiff is the owner of a lot in Irvington and the dwelling constructed thereon and resides there with her family, their actual physical occupation of the premises as their home having commenced on Thanksgiving Day of 1914. She was the owner and holder of the legal title of the property at the time the construction of the residence mentioned began, and continued as such owner except as the title thereto is affected by a conveyance to W. J. Clemens on December 30, 1914, which was accompanied by a defeasance in writing of that date, conditioned in substance that Clemens would reconvey the property on payment of all charges against the property with certain exceptions, the payment to be made within one year. The construction of the dwelling began prior to August 24, 1914, there being no building on the property before that time. The plaintiff and her family were living then on other property not owned by her. The dwelling mentioned was completed in the latter part of December, 1914. Suit to foreclose certain mechanics' liens upon it was commenced January 25, 1915, ending in a decree of foreclosure directing the property in dispute to be sold for the satisfaction of the liens. Execution was issued after the case had been appealed to this court and returned to the Circuit Court modified, and the sheriff was proceeding to advertise the property for sale when on July 14, 1917, he was notified in writing by the plaintiff here that she claimed the property to be exempt from execution as her homestead. As the defendant failed to desist in his purpose to sell the property this suit was instituted to enjoin the sale so long as the plaintiff continues to occupy it as her

homestead. In the stipulation of facts from which the foregoing statement is condensed, it is agreed that the plaintiff did not interpose her homestead right as a defense in the suit to foreclose the liens; further, that if she were allowed to testify on the subject she would state that when she commenced the building of the residence on the property she intended to make it her home as soon as she could occupy it and that the intention had never been abandoned. The Circuit Court adopted the stipulation as findings of fact and as a conclusion of law upheld the plaintiff's claim of homestead and enjoined the sale. The defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Lewis, Lewis & Finnigan, Mr. W. S. Asher, Messrs. Angell & Fisher and Messrs. Hall & Lepper*, with an oral argument by *Mr. Arthur H. Lewis*.

For respondent there was a brief and an oral argument by *Mr. L. P. Hewitt*.

BURNETT, J.—1. The question to be determined is whether or not the owner of realty, being a member of family living in a dwelling erected on the land, can claim homestead as against an execution issued on a decree foreclosing liens for labor and material furnished in the erection of the house into which the owner moved and took up her residence with her family prior to foreclosure. It is not necessary to decide what would result if she had not occupied the dwelling until after issuance of execution, for that is not the aspect of this case.

There are two lines of authority. Those precedents relied upon by the defendant are to the effect that the

lien binds the property as against the homestead exemption from the date of furnishing the labor or material, so that although at that time the would-be homesteader owned the property and intended to occupy it with his family as a home as soon as he could do so, yet all this would not prevent its sequestration by execution issued on a decree of foreclosure subsequently obtained. The other decisions, on the contrary, are to the effect that homestead is a privilege to be exercised by the owner of the property only when an attempt is made to sell it, and if at that time he comes within the purview of the homestead statute, he can successfully claim the benefit of the homestead privilege. All the cases are affected in different ways by the particular terms of the statute under which they are decided, but in the main the enactments are very much alike. Our own statute does not require any previous notice of the claim of homestead. It is said in Section 221, L. O. L.:

“The homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment hereafter obtained. Such homestead must be the actual abode of, and owned by such family or some member thereof.”

It is provided in Section 224, L. O. L., that when any officer shall levy upon such homestead, the owner thereof, wife, husband, agent or attorney of such owner, may notify such officer that he claims such premises as his homestead, describing the same by metes and bounds, lot or block, or legal subdivision of the United States. Then follows other procedure in relation thereto not necessary to be considered here. Some statutes prescribe a notice or notation on the record or some such thing to establish a homestead. The law in this state on that subject requires no previ-

ous action of that sort. The privilege here depends upon the fact whether the claimant comes within the intent of the statute. It is not necessary to have any precedent record or memorial of that fact, or to follow any particular form in asserting the claim to an officer holding an execution.

Some of the defendant's citations are here noted. In *Hansen v. Jones*, 57 Or. 416 (109 Pac. 868), the plaintiff had acquired property through her former husband's estate. A judgment was docketed against her October 14, 1907. She sold the property November 27th following. The execution was levied December 31st. The land was reconveyed to her on the tenth of the following month and three days after again acquiring the title she interposed for the first time a claim of homestead against the pending sale. Mr. Justice SLATER, discussing the situation, said:

"In this case plaintiff was not the owner of the premises at the time the execution was levied, and therefore she could not then, or thereafter, assert the right of a homestead subsequently acquired as superior to the lien of the judgment."

This language indicates that the matter is controlled by the conditions existing at the time the levy of execution is made. In *Northwestern Thresher Co. v. McCarrol*, 30 Okl. 25 (118 Pac. 352, Ann. Cas. 1913B, 1147), the circumstances were that when the judgment was rendered the defendant was living on a United States homestead not the realty in dispute. Before the execution was levied he returned to the property in suit, which had been his former abode, and then claimed it as his exempt homestead. The court said that—

"It seems well settled by the authorities that when a judgment lien has attached, it cannot be divested by

the subsequent occupation of the land for homestead purposes."

In *Upman v. Second Ward Bank*, 15 Wis. 449, the judgment had been rendered and became a final lien upon the land before the debtor came to the state, after which he went upon the land and claimed it as his homestead. The court said:

"For if the judgment debtor could defeat the creditor under such circumstances and destroy his right to sell the property, we are unable to see why a party might not, upon the same principle, buy real estate subject to sale under prior existing liens and then utterly defeat those liens by claiming the property for a homestead."

Bunn v. Lindsay, 95 Mo. 250 (7 S. W. 473, 6 Am. St. Rep. 48), was a case where the defendant had moved off the land and it was said in the syllabus:

"When a judgment lien has attached to land, it cannot be defeated or displaced by subsequent occupation as a homestead."

Many of these cases and numerous others cited by the defendant depend upon the circumstances that when the lien and the decree enforcing it attached to the property the homestead claimant was a stranger to the title. Many others rest upon the fact that whereas he once had homestead in the premises he had abandoned it.

2. In the instant case we may dismiss the arrangement with Clemens, for it appears that the instrument ostensibly passing the title, although on its face an absolute conveyance, was accompanied by a defeasance in writing showing that it was a security as against certain claims. This clearly constitutes a mortgage and did not divest the title from the grantor.

3. The defendant cites Section 415, L. O. L., reading thus:

“The provisions of Section 213 to Section 220 inclusive and Section 227 to Section 258 inclusive, of this Code, shall apply to the enforcement of a decree so far as the nature of the decree may require or admit of it; but the mode of trial of an issue of fact in a proceeding against a garnishee shall be according to the mode of trial of such issue in a suit.”

The part of the Code included in Sections 213 to 220 relates to the constituent elements of executions against property, against the person and for the delivery of the possession of real or personal property, to what counties the writ may issue, when it is returnable, and the like. Sections 227 to 258 cover exemptions as they were codified before the homestead statute was enacted, the procedure to determine by a sheriff's jury any adverse claim to property seized by him on execution, manner of levy and sale, confirmation, redemption and proceedings after execution. The defendant argues that because the homestead sections are not mentioned in the category embodied in Section 415 they do not apply to decrees in equity. This point was ruled against his contention by this court in *Davis v. Low*, 66 Or. 599 (135 Pac. 314), holding that the homestead is not subject to a mechanic's lien unless the exemption is waived or abandoned. Lord's Oregon Laws, so called, constitute only a compilation authorized by the act of March 17, 1909, Laws 1909, page 517, as amended in unimportant particulars by the act of February 23, 1911, Laws 1911, Chapter 213. By this legislation the codifier was directed “to compile, annotate and superintend the publication of the Codes and statutes of Oregon.” When he assumed the performance of this task he found the former Code making

certain sections treating of executions applicable to the enforcement of decrees. He also found the homestead exemption statute passed after the compilation upon which the former Code was based. In rearranging all the legislation which had accumulated, the learned compiler put the homestead statute in a chapter with other exemptions, which was an appropriate classification.

But the compiler was not a lawmaker. Neither is codification legislation. The homestead statute neither gains nor loses force by the place it occupies in the collection of laws. Its sanction depends upon its own terms and would be the same if it had been printed anywhere else in the Code. To withhold decrees from its operation would be to construe a remedial statute with unwarranted strictness and to put into it exceptions not within the legislative intent.

4. The defendant also cites a wealth of authority for the proposition advanced in his brief that—

“Mechanics’ liens, once acquired under an existing law, are regarded as a vested right which may not be impaired by any subsequent legislation.”

This is true as a major premise, but it is not supported by the minor premise that the homestead statute was enacted in this instance after the liens involved had become vested rights. It was passed by the legislative assembly of 1893, long before any of the occurrences described in the case under consideration. Both the lien law and the homestead statute were in force when the contract was made for which the liens are claimed as security and the agreement is controlled by them. The defendant also argues that—

“The judgment does not give birth to the lien but only provides the means to enforce it.”

This may be conceded but after all the very means to enforce the decree, viz., the execution, is what is hampered and held in abeyance by the homestead privilege. Here at the outset the plaintiff had the basic element of homestead, viz., ownership of the property. She had her family. She took no backward or divergent step but persevered in her project of creating a homestead. In this respect the case is unlike any that have been cited by the defendant.

Turning to other precedents, we find in *Walter v. Dobbs*, 38 Miss. 198, that the judgment debtor owned land and was a single man up to the day advertised for the execution sale. On that very day he married a wife but before the sale took place, occupied the premises with his spouse and successfully claimed homestead in the land. In *McMillan v. Mau*, 1 Wash. 29 (23 Pac. 441), the judgment debtor and his family moved on the land after the judgment lien attached and homestead was successfully claimed by his widow after his death, despite the judgment. It was said in *Woodward v. People's National Bank*, 2 Colo. App. 369 (31 Pac. 184):

"The statute gives to a judgment creditor a general lien upon all the real estate owned or afterwards acquired; but this general lien must yield to the special law."

The statute of Colorado under consideration required the claimant to cause the word "homestead" to be entered on the record of his title. After the debtor had done this, execution was issued on a judgment rendered before the entry of the word. Commenting upon this situation, the court further said:

"The general judgment lien attaches until the legal designation of the land as a homestead; such designation withdraws it from the operation of the general

lien that attaches to all the land owned. * * The property in question not having been subjected specifically to the judgment lien by the levy of an execution before it was withdrawn as a homestead, it was exempted from the levy of the execution."

In *Dukion v. Harkness*, 80 Miss. 8 (31 South. 416, 92 Am. St. Rep. 563), a debtor made a voluntary conveyance of the property to his wife which was set aside as having been made to defraud his judgment creditors after which he was allowed to claim it as a homestead. The principle upon which this case was decided was in effect that if the conveyance was made with the intent to defraud creditors it was utterly void and the situation was the same as if it had never been made, with the result that notwithstanding the previous judgments the execution debtor was in a situation to claim homestead when the writ was issued.

In *Barnes v. Buchanan*, 108 Miss. 822 (67 South. 462), the defendant, while a single man, sold his land to his brother. His creditor, Barnes, obtained a decree subjecting the land to payment of his claim after setting aside the deed as fraudulent but before sale could be made under the decree, Buchanan, the defendant, married, bought the land back from his brother, moved upon it with his wife and maintained it as his homestead as against the decree. The court held that specific liens fixed by equity decrees have no greater force against homesteads than law judgments.

In *Stone v. Darnell*, 20 Tex. 11, after judgment and levy of execution the judgment debtor completed a house on the land and moved into it with his family. He defended an ejectment action brought by the purchaser at the execution sale on the ground that the land was his homestead at the date of sale. The court said:

“The right to the homestead is placed by the Constitution above any claims or liens for the satisfaction of debts. * * The very object of the provision was to secure an asylum for the family whether the head of the family did or did not owe debts or whether the debts were or were not in judgments. * * The time of the sale is the time to which we must look in ascertaining the fact whether he did or did not have a homestead.”

Hawthorne v. Smith, 3 Nev. 182, 189 (93 Am. Dec. 397), construes thus a statute similar to our own:

“As the law is totally silent as to the time when a selection shall be made of the homestead, declares no penalty for failing to select, makes no reservation in favor of liens acquired before selection, but simply says that when selected it shall be exempt from forced sale, we are forced to the conclusion that, after the selection is made and filed for record, no levy upon or sale of the homestead property can be legally made except for those classes of debts mentioned in the Constitution.”

Another case depending upon the Nevada law was *Nevada Bank v. Treadway*, 8 Sawy. 456 (17 Fed. 887). In that instance five days before execution sale on a judgment against him, a single man married and with his wife filed a declaration of homestead, claiming the land upon which he had resided and continued to reside. He was sustained in his defense against an action of ejectment brought by the purchaser.

In *Cameron v. Gebhard*, 85 Tex. 610 (22 S. W. 1033, 34 Am. St. Rep. 832), the court said, in substance, if a homestead cannot be acquired until it is occupied, then no one can acquire a homestead exempted from forced sale unless he buys an improved place; and then he must have a race with the sheriff for possession.

In *Kenyon v. Erskine*, 69 Wash. 110 (124 Pac. 392), Erskine obtained a judgment against Kenyon and his wife and filed a transcript thereof with the county clerk making it a lien upon realty occupied by the defendants. Afterwards they filed their declaration of homestead and the court held that this superseded the lien of the judgment and made it nonenforceable. Another Washington case is *Snelling v. Butler*, 66 Wash. 165 (119 Pac. 3). In that instance after judgment in an action at law against them, the defendants filed their declaration of homestead on property they occupied then and when the judgment was rendered. The court enjoined sale on execution subsequently issued, saying:

"The judgment became a lien upon the property, subject to the right of the owners to defeat an execution sale by the filing of a homestead declaration. They filed the declaration before the issuance of the execution. When the declaration was filed, the property became a homestead and as such it was exempt from execution or forced sale."

In *Chafee v. Rainey*, 21 S. C. 11, when the judgment was rendered Rainey was a married man living with his second wife on the lot in question, it being his homestead. The wife died and he remained single, living alone about a year, when he married again and continued to live on the property with the third wife. The levy of execution was made after the third marriage. The court said:

"The right of homestead guaranteed by the Constitution is not an estate, but a mere right of exemption. It is nothing more than a prohibition against the use of the process of the courts for the collection of debts in certain cases and when a certain condition of things is found to exist. Whether the homestead provision in the Constitution divests the lien of a judgment is not in our judgment a question pertinent to the present

inquiry. It unquestionably forbids the enforcement of a judgment except in the excepted cases provided for in the Constitution, by levy and sale of the homestead of one who is the head of a family. When he became the head of a family is not the question. The real question is, Does the condition of things exist under which the Constitution forbids the use of the process of the courts in enforcing the collection of debts? If they do exist, then we are at a loss to perceive by what authority any officer or any court can refuse obedience to this plain mandate of the Constitution."

The question between a mechanic's lien and the right to claim homestead is not altogether one of priorities. If it were, no one could claim the exemption at all, because the very judgment forming the basis of the execution he seeks to resist is prior to his claim. The two are not to be contrasted in the strict sense of priorities, for the judgment lien is a *quasi* estate in land or at least fetters the title, while the right of homestead is a mere personal privilege. It is true that when filed, the mechanic's lien notice relates back to the time when the work began or the materials were furnished, but that does not give the demand any greater force than if the notice had been filed at the time to which it relates. In all their efforts and litigation here in question the lien claimants were seeking to collect a debt arising from contract. To be enforceable at all it was essential that their claims of liens must be founded on a contract made directly with the owner of the property or through a contractor whom the statute granting the lien makes the agent of the owner for that purpose: *Smith v. Wilcox*, 44 Or. 323 (74 Pac. 708, 75 Pac. 710); *Litherland v. Cohn Real Estate Co.*, 54 Or. 71 (100 Pac. 1, 102 Pac. 303); *Equitable Savings & Loan Assn. v. Hewitt*, 55 Or. 329 (106 Pac. 447); *Stuart v.*

Camp Carson Mining Co., 84 Or. 702 (165 Pac. 359). When the claimants of liens made their contract, with whomsoever made, they did so with reference to the existing law relating to the subject matter of their agreements. That law entered into and was a constituent element of their stipulation as much as if actually written into the contracts themselves. By that law they were notified in advance that although, by proper steps pursued in regular and timely order, they might eventually obtain a decree giving them special advantage in collection of their demands, yet under certain conditions at the very end of their course, the other party could interpose the claim of homestead, staying the execution by which they would collect their claims and reduce them to possession.

Before they took their decree the plaintiff here owned the property and was in actual possession using it as the abode of herself and family. Both the elements of homestead were present, namely, actual abode of a family and ownership by a member of that family. The decree was made when those conditions were existent and operant. The plaintiff had no call to assert her right of homestead until the attempt was made to enforce the decree by execution. Counting the statute as an element of the agreement, as we must, it was part of the contract that she might claim homestead at any time prior to execution sale. There is no indication in the record that she ever waived, released or abandoned this provision of the contract which the lien claimants are trying to enforce.

It is urged that these claims are for the very labor and material which created the dwelling the plaintiff claims is exempt and that the allowance of her claim would work a fraud upon the people who furnished the labor and material, by depriving them of just compen-

sation. The argument is persuasive, but not conclusive. It is not fraudulent, because it was a known element of the contract, a provision of the law under which the agreement was made. The lienors ought not to have made such a contract unless they were willing to be bound by it. They had no business to contract with people who might become entitled to assert homestead. The legislature has given to laborers and materialmen an exceptionally favorable method of securing and collecting their demands. The same power affords to families an advantageous method of protecting their homes from the extreme pressure of debt. The law-making power provided an extraordinary remedy but also devised a means of arresting its enjoyment. There is nothing harsh in the homestead law that with equal plausibility may not be urged against any exemption law. The family is the basis of the social fabric, the cornerstone of society. While the laborer is justly the object of legislative protection, the family, whether that of the laborer or another, is equally if not more deserving of its beneficence. It is a far cry from the olden time when there was imprisonment for debt and the father might be confined in jail while his family starved because he could not pay. The world has moved since then, and the law, deeming the family of more importance than its debts, has provided for it the homestead as a citadel in which it is safe as against them for at least a shelter. This was the law under which the lien claimants operated and they cannot complain if the courts give effect to its provisions as it then stood, although it has been amended since then to except from the homestead law mechanics' liens as well as mortgages: Laws 1919, Chap. 112. The doctrine is thus stated in *Scofield v.*

Hopkins, 61 Wis. 370 (21 N. W. 259), Mr. Justice CASSÓDAY delivering judgment:

“The policy of the law is to secure to the debtor and his family a homestead which shall be beyond the reach of his creditors, however numerous. The statute seems to have been made for those who get in debt, and not for those who always pay their debts. Such need no exemption law, for they are a law unto themselves to that extent. This policy of the statute would certainly be frustrated if none are entitled to the exemption except those who have been so fortunate as to obtain a homestead prior to becoming judgment debtors. The spirit, if not the letter, of the law gives the right of acquisition, as well as protection after acquisition. There can be no such exemption without ownership. If it is also true that there can be no exemption until there is a dwelling-house upon the premises, actually occupied by the debtor personally, then it would be almost impossible for a homeless debtor, with judgments docketed against him, to get the benefit of the law; for the very instant he acquired the title, the judgment lien would attach. Under such a construction, the only possible way of securing such benefit would be to select premises with a dwelling already thereon, and then actually occupy, with the family, prior to the acquisition. But such strict literalism would do violence to the obvious intent of the legislature, and the whole current of authority in this state upon this subject. It was among the purposes of the statute to enable anyone without a home of his own to acquire one, even though judgments may be docketed against him when he embarks in the enterprise. The acquisition of a completed homestead is seldom instantaneous. Generally, it requires years of industry and economic living. The purpose necessarily precedes the inception of the work, and that is followed by successive steps, until completion is attained. The land must be acquired, the location of the dwelling-house designated, the cellar dug, the materials procured, the foundations laid, the superstructure erected,

and then all fitted for a dwelling-house, before actual occupancy with the family can take place. These successive steps in the acquisition of a completed homestead, made in good faith, come within the spirit of the statute, and are each entitled to the protection afforded by it."

The case before us is not to be confounded with one where the homesteader buys for his home a tract upon which there is already a lien of any kind. In such an instance there is no privity of contract between him and the lienor so necessary to support a mechanic's lien, and he takes the estate *cum onere*. The philosophy of the cases relied upon by the defendant and which hold that after judgment it is too late to occupy the land and then for the first time claim homestead seems to be that the claimant has in such an instance chosen for his homestead a property having an inherent defect in the title; that he takes the estate with its existing infirmities and that he cannot complain if it fails him because of them. By analogy, this theory has countenance in *Hansen v. Jones*, 57 Or. 416 (109 Pac. 868). There, after judgment and before execution, the judgment debtor sold the land, thus destroying one of the essential statutory elements of homestead, that of ownership. This let in the judgment as a final adjustment of the relations of the parties to the land and when the judgment debtor repurchased it she took an estate less by the effect of the judgment than she had before. On principle, the soundest legal deduction is that as between the parties directly involved in mechanics' and materialmen's liens, the homestead privilege, available as it is, only when and not until execution issues, attends the contract and affects it from its inception through all its stages in whatever

form it assumes, to and including its ultimate form of a decree of foreclosure.

On the other hand, for the reason that the right to claim homestead is a nonassignable personal privilege and that there is no privity of contract to support his homestead in the land beyond the part remaining after the lien is carved out of it, no stranger can buy the property after the lien attaches and exclude it from its effect on the estate. In the instant case when the contractual relations in question began they at once assumed a process of development. The lienors commenced with an essential element of furnishing labor or material. On their side their status and the contract progressed from thence through all the stages of filing a notice of claim of lien, suit to foreclose and decree, the final step being execution and sale, by which alone the contract was to be consummated and the chose in action reduced to possession.

Furnishing material does not *ipso facto* give a right to sell the realty, neither does filing notice of lien. These are but steps in an extraordinary remedy for the collection of a debt. Also, a suit is necessary and there must be a decree and execution before the lien claimant can enjoy the fruits of his process. Running with them as a factor always to be reckoned with, is the element of homestead which persists and is potent if urged at any time prior to the execution sale, as taught in *Wilson v. Peterson*, 68 Or. 525 (136 Pac. 1187). In the development of the contractual relations involved the plaintiff here started with the equally indispensable elements of family and ownership of the property and coeval with or prior to the decree, attained the remainder of the necessary characteristics of homestead right, namely, actual occupancy of the premises as a home for herself and family.

As much as any other ingredient of the contractual connection between the parties, the right of the plaintiff to claim homestead, grounded as it was at the outset on her ownership in the property, affected that connection and kept pace in development with the evolution of the claims of the lienors. She did not abandon the basic characteristic of her privilege, that of ownership, by selling the realty as in *Hansen v. Jones*, 57 Or. 416 (109 Pac. 868). On the contrary, she continued on her course in preparing her homestead as sanctioned under similar statutes by the precedents in Arkansas, Texas, Nevada, Nebraska, Michigan, Oklahoma and South Dakota, here noted: *Stone v. Darnell*, 20 Tex. 11, followed by *Macmanus v. Campbell*, 37 Tex. 267; *Miller v. Flattery* (Tex. Civ. App.), 171 S. W. 253), stating that "when a homestead dedication has not been effected by actual occupancy, such effect must nevertheless be accorded to ownership, intention and visible acts of preparation to use it for a home"; *Nevada Bank v. Treadway*, 8 Sawy. 456 (17 Fed. 887); *Reske v. Reske*, 51 Mich. 541 (16 N. W. 895, 47 Am. Rep. 594), where in an opinion by Mr. Justice COOLEY the homestead of a young married couple was protected against an execution sale without their actually sleeping or eating on it or completing their dwelling-house, although they had built a stable and outbuildings, kept their stock there and occupied it as a woodyard, it having been their intention as manifested by their acts, to make it their homestead: *Mills v. Hobbs*, 76 Mich. 122 (42 N. W. 1084); *Myers v. Weaver*, 101 Mich. 477 (59 N. W. 810); *Corey v. Waldo*, 126 Mich. 706 (86 N. W. 122).

In *Gregory v. Pritchard*, 240 Fed. 414 (153 C. C. A. 246), involving consideration of the Oklahoma statute, a married man having no other realty bought for his

homestead a house and lot, then under lease for one year, on the information that the tenant would surrender the lease. After he purchased, he used every effort to get possession, but without avail, as the lessee refused to vacate. During the remainder of the term, the purchaser painted the house and made some repairs. The court protected him in his claim of homestead as against his trustee in bankruptcy. See, also, *McFarland v. Coyle* (Okl.), (172 Pac. 67), where similar conditions availed the homestead claimant against an execution sale; also *Illinois Life Ins. Co. v. Rogers* (Okl.), (160 Pac. 56). *Kingman v. O'Callaghan*, 4 S. D. 628 (57 N. W. 912), teaches that a homestead in realty may be claimed by one who has bought it for that purpose, begins the erection of a house and moves into it as soon as the nature of the case admits. *Gill v. Gill*, 69 Ark. 596 (65 S. W. 112, 86 Am. St. Rep. 213, 55 L. R. A. 191), holds that the object of occupancy is to give notice of the claim of homestead; that mere intent alone is not sufficient but that when coupled with actual preparation to enter, such as repairing, cleaning, installing furniture and the like, occupancy is constructively established. *Hanlon v. Pollard*, 17 Neb. 368 (22 N. W. 767), was a case where a woman having a family bought land then in possession of a tenant. Her purpose was to occupy it as a homestead on expiration of the lease. A judgment was rendered against her after she bought but before she occupied the land. However, on the strength of her proved intention, her claim of homestead was sustained. In *Fogg v. Fogg*, 40 N. H. 282 (77 Am. Dec. 715), the owner was moving into the premises and had part of his furniture in the house when an attachment was levied upon the realty. He finished moving next day and was sustained in his claim of homestead.

These precedents indicate the length to which many courts have gone in their liberal construction of this protective statute, saying, in effect, that the occupancy required may be proved by the circumstantial evidence of intent coupled with acts indicative of a purpose to establish a home on the property in question. In the present litigation it is not necessary to occupy the advanced position assumed by these decisions, for when the lienors arrived at the point where they could issue execution against which alone homestead may be urged, the plaintiff was there before them with her fully developed right of homestead to prevent their sale. The ultimate purpose of their procedure was to divest her of the title to her property. When they essay the final act of the process, that of sale under execution, they are halted by the privilege the law gives her of claiming homestead. She is then in the situation to exercise it. Then is the only time she can use it, and to deny it to her now is to graft upon the statute in favor of lienors an exception not found there and so frustrate the benignant purpose of the law.

The decree of the Circuit Court is affirmed.

AFFIRMED.

BEAN and BENNETT, JJ., concur.

JOHNS, J., dissents.

Submitted on brief June 27, modified September 16, 1919.

STATE OF OREGON v. GANONG.

(184 Pac. 233.)

Eminent Domain—State Liable for Attorney's Fee Only When Alleged and Proved.

1. In view of Sections 577, 6860, 7424, 7434, 7442, 7448, 7459, 7495 and 7503, L. O. L., state condemning land for highway is liable for attorney's fees under Section 6868, as amended by Laws of 1913, page 81, providing for "reasonable attorney's fees to be fixed by the court at the trial" only where the attorney's fee is alleged and proved by defendant and tried by a jury where the other facts are tried by a jury.

States—State not Liable for Costs in Absence of Statute.

2. The state is not liable for costs and disbursements unless there is some statute which expressly or by clear and necessary implication includes it, since the mere general terms of a statute giving costs do not include the sovereign.

Eminent Domain—State can Abandon Proceeding to Condemn Land.

3. In state's proceeding to condemn land for highway, court had no power to enter a judgment compelling payment of award, since state could have abandoned proceeding.

Eminent Domain—Judgment Provides for Costs and Disbursements Though Proceeding Abandoned.

4. The trial of an action in which land is condemned for public use is followed by a judgment which is made up of two distinct parts; one relating to value of land to be paid for in event land is actually taken, the other relating to costs and disbursements to which defendant is entitled, regardless of whether plaintiff does or does not take the land.

Costs—Where Statute Allows Attorney's Fee It must be Alleged and Proven.

5. A litigant upon whom the statute confers the right to an attorney's fee must allege the amount claimed and offer evidence in support of the allegation, notwithstanding that court has special knowledge of the subject.

Costs—Successful Party must File Verified Cost Bill.

6. Costs and disbursements cannot be allowed a successful litigant unless he pleads his costs and disbursements by filing a verified cost bill, and if the defeated litigant desires to contest the cost bill, he must do so by filing verified objections; the two verified papers constituting the pleadings.

From Clackamas: ROBERT TUCKER, Judge.

In Banc.

The sole question involved in this appeal is, whether or not the defendants are entitled to attorneys' fees in a condemnation proceeding brought by the state, to condemn a right of way for the Pacific Highway across defendants' premises.

It is urged by the state that no attorney's fee is recoverable in a proceeding of this kind, where the state itself is a party plaintiff; and the state further contends that if such a fee is recoverable at all, there must be an allegation in relation thereto in the pleadings before the case is submitted to a jury, in order to justify the taxing of the same.

In this case there was no allegation in the answer as to the amount which would be reasonable as an attorney's fee, the only allusion thereto being in the prayer that the defendants "have judgment for their costs and disbursements herein, including a reasonable attorney's fee." This was the condition of the pleading up to the time the defendants were about to rest, at which time it was stipulated in effect that if the defendants were entitled to a reasonable fee at all, the court might fix the same; but the plaintiff insisted upon its contention that the defendants were not entitled to any attorney's fee at all.

Upon this stipulation the jury was sent out for deliberation, and thereafter the amount of attorney's fee was taken up before the court, and the plaintiff again objected to any attorney's fee upon the following grounds: (1) That there are no allegations in any of the pleadings which will support a verdict or judgment awarding the same, or permit the introduction of any testimony in support thereof, and that only such facts as are alleged in the pleadings may be proved by the

evidence or supported by the verdict, and the judgment cannot be in excess of such allegations. (2) That there is no statute allowing attorney's fees, fixed by the court, to be recovered from the state where it is the plaintiff, in proceedings of this kind.

Thereupon counsel for defendants moved the court for permission to amend their answer, by including therein an allegation to the effect that \$300 was a reasonable sum to be fixed and allowed by the court as an attorney's fee. This amendment was allowed over the objection and exception of plaintiff, and the court afterwards fixed the attorneys' fee at \$300, which was taxed by the clerk as part of the costs. **MODIFIED.**

For appellant there was a brief over the names of *Mr. Geo. M. Brown*, Attorney General, and *Mr. Isaac H. Van Winkle*, Assistant Attorney General.

For respondents there was a brief submitted by *Mr. Joseph E. Hedges* and *Messrs. Wood, Montague & Hunt*.

BENNETT, J.—Section 6872, L. O. L., enacted by the legislature in 1905, authorized the state to commence proceedings for the appropriation of real property for public use, and contains the following provision:

“The procedure in said suit, action or proceeding, shall be, as far as applicable, the procedure provided for in and by the laws of this state for the condemnation of land or rights of way by public corporations or quasi public corporations for public use or for corporate purposes.”

Section 9 of Chapter 237, 1917 Laws, gives to counties, in the first instance, the right to bring proceedings

to appropriate rights of way for state highways, and then provides:

"In case of neglect or refusal to so acquire said right-of-way, the State shall have the power, through the Commission, to acquire said right-of-way either by donation, purchase, agreement, condemnation, or through the exercise of the power of eminent domain, in the same manner as is provided by law for acquiring property for other public uses."

Section 577, L. O. L., adopted in 1862, provided:

"In all actions or suits prosecuted or defended in the name and for the use of the state, or any county or other public corporation therein, the state or public corporation shall be liable for, and may recover, costs in like manner and with like effect, as in the case of natural persons."

At the time of the enactment of Section 6872, L. O. L., authorizing the appropriation of real property, etc., generally by the state, and providing that the procedure should be the same as in the nature of condemnations by public corporations, the law did not make such public corporations liable for any attorney's fee, except statutory costs, the law as to costs and disbursements in such cases, then reading as follows:

"The costs and disbursements of the defendant shall be taxed by the clerk, and recovered off the corporation; but if it appear that such corporation tendered the defendant, before commencing the action, an amount equal to or greater than that assessed by the jury, in such case the corporation shall recover its costs and disbursements off the defendant": L. O. L., § 6868.

In 1913, however, the foregoing section was amended so as to read as follows:

"The costs and disbursements of the defendant, including a reasonable attorney's fee to be fixed by the court at the trial, *shall be taxed by the clerk* and recovered from the corporation, but if it appear that such corporation tendered the defendant before commencing the action an amount equal to or greater than that assessed by the jury, in such case the corporation shall recover its costs and disbursements from the defendant, but the defendant shall not be required to pay the plaintiff's attorney fee."

And it is under this amendment the attorney's fee of \$300 was claimed by the defendants and adjudged to them by the court.

One of the questions, and perhaps the most far-reaching and serious one, in the case, is whether or not this latest amendment applied to condemnation proceedings brought directly by the state.

On behalf of the plaintiff it is urged that when the legislature in 1905 provided for condemnation proceedings by the state, and that in such proceedings the procedure should be, as far as applicable, the procedure provided for in and by the laws of this state for the condemnation of land or rights of way by public corporations for public use; that it adopted in such condemnation proceedings, only the laws governing condemnations by other public corporations, as they then stood, and not as they should thereafter be amended. And to support this contention the plaintiff refers the court to the following cases: *State v. Caseday*, 58 Or. 429 (115 Pac. 287); *Skelton v. Newberg*, 76 Or. 126 (148 Pac. 53); *Martin v. Gilliam County*, 89 Or. 394 (173 Pac. 938).

On the other hand, the defendants suggest a distinction between the statutes adopting the provisions of a specific enactment, and the adoption by a special act of *general* provisions of the law, by a general clause in

the later enactment; and contend that, while the rule contended for by the plaintiff is the general rule in cases where some specific enactment is adopted by section and chapter; yet when the provision is general, and refers to general procedure, as in this case, a different rule applies, and subsequent modification of the general practice will be deemed to be within the intent of such adoption.

In support of this contention the defendant cites the decisions of a number of states and the texts of Endlich on Interpretation of Statutes, and Lewis' Sutherland on Statutory Construction.

It seems this contention is well founded, both in principle and upon authority, and should be sustained.

In Lewis' Sutherland on Stat. Const. (2 ed.), Section 405, it is said:

"There is another form of adoption wherein the reference is not to any particular statute, or part of a statute, but to the laws generally which govern a particular subject. The reference in such case, means the law as it exists from time to time, or at the time the exigency arises to which the law is to be applied."

To the same effect is the doctrine as stated by Endlich on Statutory Construction, Section 493.

In the California case of *Ramish v. Hartwell*, 126 Cal. 443 (58 Pac. 920), the court, on this subject (speaking of the general rule invoked by plaintiff here), says:

"This rule is subject to a qualified exception, in cases of adoption in a special act of the provisions of law then in force by virtue of general laws. In such cases, subsequent modifications of the general law, will be deemed to be within the intent of such adoption, so far as they are consistent with the purposes of the particular act."

In *State v. Williams*, 237 Mo. 178 (140 S. W. 894), the court says:

“The rule of construction, where one statute adopts another, is that, if the adopting statute specifically designates the title or date of the statute adopted, then the repeal or amendment of the statute thus adopted, will not affect the adopting statute, but when a statute like the one now under consideration refers to the general provisions of the law on a given subject for its interpretation, then an amendment of the general laws on that subject affects a corresponding amendment of the statutes adopting them.”

This seems to be the rule generally agreed upon by the authorities; also the natural and appropriate construction of the language of Section 6872, L. O. L., and Section 9, Chapter 237 of the Laws of 1917.

The language in the former section, providing that the procedure in a condemnation proceeding by the state, shall be “the procedure provided for in and by the laws of this state for the condemnation of lands for rights of way by public corporations,” seems to refer to the laws of the state at the time of the proceeding by the state, and not to the laws as they were at the time of the enactment of the section.

Section 9, Chapter 237, Laws 1917, is still plainer: “In the same manner as is provided by law for acquiring property for other public uses.” Indeed, at the time this latter section was enacted, the provision for an attorney’s fee generally in such condemnation proceeding was existent.

Any other construction of these sections would be confusing and create an incongruous condition, under which there would be two entirely different methods of procedure in civil trials of the same identical nature—one where other public corporations were parties, and another, where the state itself was a party.

The amendment here in question is by no means the only change in the general procedure, since the authorization of the condemnation proceedings by the state in 1905. On the contrary, there have been many other changes.

Section 126 of the Code, passed in 1909, changed the manner of the selection of the jury. Section 132 was amended in 1905 at a later date than the passage of Section 6872, and provided for instructions in writing, when required by either party; and in 1911, the manner of rendering the verdict generally in civil cases, was entirely changed by a provision that three fourths of the jury might find a verdict instead of the unanimous verdict which has been previously required.

If these changes were not to apply to the procedure in a condemnation action brought by the state, because the changes were made *after* the enactment of the law authorizing condemnation proceedings directly in its behalf, it would mean that in all such proceedings the trial courts would be compelled to go back to the old law, and we would have the confusion resulting from two different methods of trying such proceedings.

Besides this, it is only fair that the state should be governed, when it goes into court, by the same rule which it has provided for other litigants. The provision for an attorney's fee in case of condemnation by public corporations, must be deemed to be founded on justice; and if it is just in the case of counties, or other public corporations, that a party who is haled into court without fault, in a condemnation proceeding, should recover a reasonable attorney's fee, it is also equally just and right when the proceeding is brought by the state. It would ill befit the state to provide a rule that other public corporations should pay an attorney's fee in such proceedings, upon the ground that it

was only justice, and then attempt to escape similar liability itself. It ought not to be presumed that the legislature had intended any such unseemly result. It ought to be presumed, unless clearly provided to the contrary, that when the state goes into court and initiates a civil proceeding, it is bound by the same rules which it has declared to be just and fair in regard to other litigants.

It seems, therefore, that the state is liable for an attorney's fee in a condemnation proceeding where it has made no tender, or where a larger sum than it has tendered has been recovered, the same as any other public corporation.

The cases cited on behalf of appellant are easily distinguishable from this case. In *State v. Caseday*, 58 Or. 429 (115 Pac. 287), the trial was a criminal one; and the question was whether the defendant, in alternating with the state in exercising its challenges, should exercise two of its challenges to the states one in each turn (the defendant having double the number of the state's challenges in a criminal proceeding) or whether each side should exercise only one challenge in turn, thereby leaving the defendant with half of his challenges after the state's challenges were all exhausted. It was very properly held that the Criminal Code, being entirely independent of the Civil Code, and its provisions in regard to the selection of the jury and the number of challenges, being entirely different from that of the Civil Code, the provision of the Civil Code alternating challenges one by one, which was entirely inappropriate to the provisions of the Criminal Code as to the number of challenges, did not apply.

The Criminal Code, adopting some of the provisions for the formation of trial juries, did so by express reference to chapter and title of the Civil Code.

“The trial jury is formed in the manner prescribed in Chap. 2, Title 2 of the Code of Civil Procedure, etc.”

The general rule already alluded to that where one enactment adopts specially, either by words, or chapter and title, the provision of some other act, that subsequent changes in the adopted act, in the act referred to, are not adopted or carried over, was applied.

There is no question about this general rule, and there was no occasion for the court to consider the exception, and the court did not consider it, or pass upon it in any way.

In *Skelton v. Newberg*, 76 Or. 126 (148 Pac. 53), the question was whether the judgment should be reversed, because it had not been entered on the day on which the verdict was rendered, in accordance with the law of 1907. Previous to that time the provision was that the judgment should be entered within two days from the time the verdict was rendered. As a matter of fact the judgment had not been entered in accordance with either statute, it not having been entered until twenty-four days after the verdict. The court held that both statutes were directory only, and that the judgment could not be reversed on that ground.

It was provided in the condemnation act then under consideration, that proceedings should be “in the same manner as in an action at law, except as in this title otherwise provided.” However, it was “specially provided” in the condemnation act that judgment should not be given appropriating the land until the damages sustained by the defendant were paid into court. Of course, in such a case the provisions of the general law were inapplicable.

In that case the court again refers to the general rule that—

“Where the provisions of one statute are incorporated into another by mere reference, a subsequent change in the former will not disturb the terms of the latter.”

But the exception seems to have been in no way called to the attention of the court, and, as we have seen, the question was in no way before the court.

In the case of *Martin v. Gilliam County*, 89 Or. 394 (173 Pac. 938), the question was an entirely different one, being the question of whether or not Chapter 222, Laws of 1915, extending the budget law over districts and cities, was constitutional. It was held that it was not because it amended a previous act in effect by mere reference to its title.

The doctrine announced in that case may have been entirely proper and applicable under the circumstances, but it would be carrying it much too far, and would result in utter chaos in our judicial procedure, to attempt to apply it to provisions in relation to procedure like those now under consideration; for the instances under our practice in which the proceedings in one class of cases have been regulated by the adoption of the proceedings pointed out in other provisions of the Code, and in that way alone, are manifold; and yet these provisions have been constantly accepted and the courts have been proceeding thereunder in many cases for years.

As we have already seen, a very large portion of the proceedings in criminal cases are those thus adopted and applied from the Civil Code. We would be without any provisions whatever for the regulation of the proceedings in condemnation cases, if such adoption by reference was not valid.

Section 6860, L. O. L., being a part of the general act providing for the appropriation of lands by railroads and other corporations, provides:

"Such action shall be commenced and proceeded in to the final determination, in the same manner as an action at law, except as in this title otherwise specially provided."

So in Section 7042, L. O. L., in regard to proceedings by a wife to compel the support of her husband, the only provision in regard to the practice, is:

"The practice in such cases shall conform as nearly as may be to the practice in divorce cases, and the court shall have power to enforce its orders as in a suit for divorce, or other suits in equity."

And the Code is full of similar provisions, where one law is made applicable by mere reference to the proceedings under it in another law. Indeed, in this very action there would be no provision whatever for any proceeding by the state to condemn, or any provision regulating the proceedings, if this provision that "the proceeding in said suit, action or proceeding shall be, as far as applicable, the procedure provided in and by the laws of this state for the condemnation of lands by public corporations" is not valid and effectual.

It is further contended by the appellant, however, that the defendant could not recover such an attorney's fee in this particular proceeding, because there was no allegation in the pleading, as to what would be a reasonable fee; but it does not seem to me that any such allegation was necessary. The provision of the law is that "the costs and disbursements of the defendant 'including a reasonable attorney's fee to be fixed by the court at the trial' shall be taxed by the clerk and recovered from the corporation." It seems

clear that the legislature intended this fee as a part of the costs, to be fixed by the court, and taxed by the clerk in a summary way, the same as any other costs.

It is true that in most items of cost provided for by statute, the amount per item is fixed by law, as in case of witness fees at so much per day, and so much per mile; but there is always a question of fact involved in each item of every cost bill just the same. The question as to how many days the witness actually did attend—whether his testimony was material—how many miles he traveled, etc., are all questions of fact, which must be settled by the determination of the court. Yet it would be unreasonable to say that all of these things must be alleged in formal pleadings at the commencement of the action. Such a rule would be utterly impossible. And it would be just as unreasonable to hold that the defendant must, in its answer, allege what would be a reasonable attorney's fee to be fixed by the court, in advance of the actual litigation. The reasonableness of the attorney's fee would depend entirely upon developments in the case, which the defendant could not know at the beginning of the action. Under our practice the defendant must swear to his answer, and to require him to allege and swear to something which he could not know, and which would depend wholly and entirely upon future developments, would be not only to invite but compel him to perjury.

A case like this is clearly distinguishable from the ordinary proceeding to recover on a promissory note or in the matter of a mechanic's lien. There the plaintiff is the moving party and the fee in the first instance is largely theoretical and it seems necessary to make the amount of it, an issue of fact.

But here the law provides that (where there is no tender or the tender is exceeded by the verdict) the defendant shall recover such a fee in *every* case. The law does not say that if he pleads it or asks for it, he shall recover it, but he shall absolutely be entitled to some fee and the only question to be passed upon is the amount of the fee; which shall be fixed by the court in every case, without regard to the pleading, and then shall be taxed by the clerk, the same as other costs and disbursements.

The only difference between the taxing of this and any other item of cost, is that in ordinary disbursements, the amount is fixed by law per item, and the question of fact arising is, as to what items the prevailing party is entitled to recover; while here by reason of the nature of the item, it cannot be fixed arbitrarily by law, and is left to the discretion of the court. But the principle is no different from that involved in the taxing of any other item of cost.

In this case there seems to be no question as to the amount of the fee, or the reasonableness of the sum fixed by the court, if the defendant is entitled to recover costs at all. In this view of the case it is unnecessary to inquire into the question of whether or not the amendment of the pleading at the close of the trial was timely or within the proper discretion of the court.

Judgment of the court below should be affirmed.

HARRIS, J.—1. I agree with the reasoning employed by Mr. Justice BENNETT and I concur in the conclusion reached by him concerning the effect which the amendment of a previously adopted statute has upon the adopting statute; but I cannot concur in the conclusion that Chapter 49, Laws 1913, empowers the

judge to fix and allow an attorney's fee without a pleading claiming it and without evidence proving it.

2. The state is not liable at all for costs and disbursements unless there is some statute which expressly or at least by clear and necessary implication includes it, because the rule, universally recognized and universally applied, is that the mere general terms of a statute giving costs do not include the sovereign: 10 R. C. L. 194. The right of a private person to an affirmative judgment against the state for costs and disbursements must be measured and determined by the cold language of the statute, and by nothing else. Section 577, L. O. L., declares that,

"In all actions or suits prosecuted or defended in the name and for the use of the state * * the state * * shall be liable for and may recover costs in like manner and with like effect as in the case of natural persons."

Section 6860, L. O. L., provides that an action for the condemnation of land "shall be commenced and proceeded in to final determination in the same manner as an action at law, except as in this title otherwise specially provided." Section 6868, L. O. L., as amended by Chapter 49, Laws 1913, states that:

"The costs and disbursements of the defendant, including a reasonable attorney's fee to be fixed by the court at the trial, shall be taxed by the clerk and recovered from the corporation, but if it appear that such corporation tendered the defendant before commencing the action an amount equal to or greater than that assessed by the jury, in such case the corporation shall recover its costs and disbursements from the defendant, but the defendant shall not be required to pay the plaintiff's attorney fee."

Manifestly, the legislature has expressly included the state.

The jury returned a verdict fixing \$750 as the damages to be paid for taking the land. Upon the return of the verdict a judgment was entered on June 14, 1918, reciting the finding of the jury and ordering that upon the payment of the sum of \$750 the land be appropriated unto the state for the purposes of a highway; and this same judgment also adjudged that the defendants recover from the plaintiff their costs and disbursements "together with the sum of \$300, which is hereby fixed and allowed to said defendants as a reasonable attorney's fee." Five days afterwards, on June 19th, a second judgment was entered reciting that the plaintiff "has paid into this court the sum of \$750, being the amount of damages assessed by the jury and found for said defendants in this cause," and it was adjudged that the premises "be and the same are hereby condemned and appropriated to the plaintiff * * for a right of way for a state highway."

3. The court did not have the power to enter a judgment compelling payment of the award, for if the state desired to do so it could have abandoned the proceeding. The purpose of the trial was simply to ascertain and fix the amount which should be paid if the state concluded to take the land: *Oregonian R. Co. v. Hill*, 9 Or. 377; *Oregon R. Co. v. Bridwell*, 11 Or. 282 (3 Pac. 684); *McCall v. Marion County*, 43 Or. 536, 541 (73 Pac. 1030, 75 Pac. 140). However, Section 6868, L. O. L., as amended by Chapter 49, Laws 1913, provides that—

"The costs and disbursements of the defendant, including a reasonable attorney's fee * * shall be * * recovered from the corporation * * ."

4. In other words, the plaintiff must, aside from the exceptions named in the statute, pay the costs and disbursements of the defendant; and if there has been a

verdict by the jury the plaintiff must also pay a reasonable attorney's fee: *Warm Springs Irr. Dist. v. Pacific Livestock Co.*, 89 Or. 19 (173 Pac. 265). The trial of an action in which land is condemned for a public use is followed by a judgment which is made up of two distinct parts: One, the part which relates to the value of the land, the plaintiff must pay only in the event the land is actually taken; while the other, the part which relates to the costs and disbursements, must, in all cases where the land owner is entitled to costs and disbursements, be paid at all events, regardless of whether the plaintiff does or does not take the land. Originally Section 6868 included only costs and disbursements and no provision was made for a reasonable attorney's fee until the amendment of 1913. Obviously it was the purpose of the legislature to compel the payment of a reasonable attorney's fee if a condemnation action proceeded as far as a verdict; and in order to accomplish that purpose the lawmakers directed that the amount of a reasonable attorney's fee should be included with and become a part of the costs and disbursements, because by including the item for the attorney's fee with the costs and disbursements the defendant could enforce the collection of the attorney's fee if the plaintiff declined to take the land after the jury fixed its value.

The amendment of 1913 declares that this reasonable attorney's fee "shall be taxed by the clerk." That officer, however, has nothing to do with fixing the amount. The statute says that the amount is to be fixed, not by the "judge," but by the "court"; and the amount is to be fixed by the court "at the trial." It is true that the circumstance that the word "court" appears in the statute is not conclusive; but it is also true that the employment of the word "court" instead

of the word "judge" is highly significant. If the word "judge" had been used that circumstance, it must be conceded, would greatly strengthen the position of the defendants and the strength of their position would be further augmented if besides using the word "judge" instead of the word "court," the words "at the trial" had been omitted. The statute however does not employ the word "judge"; nor does it omit the words "at the trial"; and consequently the presence of the words "court" and "at the trial" are at least significant, if not very persuasive: See *Warm Springs Irr. Dist. v. Pacific Livestock Co.*, 89 Or. 19 (173 Pac. 265). The language of Chapter 49, Laws 1913, so far as it relates to the allowance of a reasonable attorney's fee, is substantially like every other statute that had ever been enacted prior to 1913 in this state for the allowance of an attorney's fee: See Sections 7424, 7434, 7442, 7448, 7459, 7495 and 7503, L. O. L.

5. The words "shall allow a reasonable attorney's fee" or the words "a reasonable attorney's fee shall be allowed," and the like, have never been construed to mean that a party is entitled to the allowance of an attorney's fee in the absence of allegations and proof. In this jurisdiction the rule has always been that a litigant upon whom the statute confers the right to an attorney's fee must in order to exercise that right, allege the amount claimed and offer evidence in support of the allegation; and if the litigant fails to allege some amount or to prove some amount he must fail and the judge cannot allow some amount in despite of the absence of allegations or evidence merely because he happens to have special knowledge upon the subject, any more than he could in like circumstances fix the value of a horse, alleged to have been converted,

merely because he happens to have special knowledge about horses and their value. The practice in this jurisdiction is illustrated by Section 7424, L. O. L., and the construction placed upon it by this court. This section is a part of the mechanic's lien statute which was enacted in 1885 and, so far as it relates to attorneys' fees, reads as follows:

"In all suits under this act, the court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees."

The language of Section 7424, it will be observed, is just as imperative as the words in Chapter 49, Laws 1913; and yet every recorded decision, without a single exception, has been to the effect that a claimant under Section 7424 must claim an attorney's fee by alleging and proving it: *McInnis v. Buchanan*, 53 Or. 533, 542 (99 Pac. 929); *Sattler v. Knapp*, 60 Or. 466 (120 Pac. 2). Indeed, the language found in most of the sections of the Code, to which attention has already been directed, is not less mandatory than the words in Chapter 49, Laws 1913. Nor does the circumstance that the attorney's fee is associated with the "costs and disbursements" of the trial differentiate Chapter 49, Laws 1913, from any of the other sections of the Code which have been mentioned. In Section 7424 the court shall "allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees." It is said in Section 7434, L. O. L., that "the court shall allow such attorney's fees as may be reasonable, to be taxed as costs." We read in Section 7448, L. O. L., that—

"The court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid

for the filing and recording of the lien, and also a reasonable amount as attorney's fees."

Section 7459, L. O. L., declares that a lien claimant

"Shall be entitled to recover out of the proceeds of the sale of said property, or from the person owning the same, the cost and expense of making and recording said lien, together with such sum as the court shall adjudge reasonable as attorney's fees in any suit brought to foreclose said lien."

Section 7495, L. O. L., states that the lien claimant shall be entitled to recover the expense of making and recording the lien "together with such sum as the court shall adjudge reasonable as attorney's fees." In Section 7503, L. O. L., it is stated that in all suits brought to foreclose certain liens "the court shall, upon entering judgment for the plaintiff, allow as a part of the costs in said suit all moneys paid for the filing and recording of the lien and also a reasonable amount as attorney's fees." The act of 1913 was framed in the light of prior legislation providing for attorney's fees and in the light of the construction placed by the courts upon such prior legislation; and consequently the same practice should prevail in the application of the statute of 1913 as has prevailed in the application of prior like legislation. The amendment of 1913 contemplates that the question of the amount of an attorney's fee is one of fact to be submitted to the triers of fact upon pleadings and evidence the same as any other disputed question of fact and in conformity with the practice which has without exception been followed from the beginning in this jurisdiction. If the amount is to be fixed by the "judge" why does the statute command that it be fixed at the "trial"? If the amount is to be fixed without evidence, then why does the statute command

that it be fixed "at the trial"? The obvious intent of the statute is that the defendant shall claim an attorney's fee by alleging it so that the opposing party may appear "at the trial" with witnesses and litigate the question before the "court" exactly as any other disputed fact is litigated. The statute contemplates that the amount of the attorney's fee must be (1) alleged; (2) proved by evidence; and (3) tried by a jury if the other facts are tried by a jury.

6. It is true that in *Portland Sash & Door Co. v. Parker*, 61 Or. 203 (121 Pac. 1135), and in *Wills v. Zanello*, 59 Or. 291 (117 Pac. 291), it was stipulated by the litigants that the court could fix the amount of an attorney's fee and based upon such stipulation the court did fix the fees. But in neither of those cases were any of the questions now under consideration raised or discussed or decided and hence neither of those decisions should be regarded as a precedent. All the arguments that have been here advanced in support of the position taken by the defendants, including the argument growing out of the difference between fees allowed by statute and those stipulated for by contract as well as the argument based upon the records made in *Portland Sash & Door Co. v. Parker*, 61 Or. 203 (121 Pac. 1135), and *Wills v. Zanello*, 59 Or. 291 (117 Pac. 291), and also the argument predicated upon the holdings made in some of the other states, were presented and considered in *Columbia River Door Co. v. Todd*, 90 Or. 147 (175 Pac. 443, 860); and in that case this court squarely decided that the attorney's fee allowed by the statute was an issuable fact to be pleaded and proved by evidence. The act of 1913 was not intended to dispense with pleading and evidence. Not even "costs and disbursements" can be allowed a successful litigant in any suit or action

unless he pleads his "costs and disbursements" by filing a verified cost bill, and if the defeated litigant desires to contest the cost bill he must do so by filing verified objections and these two verified papers constitute the pleadings. The statute of 1913 does not contemplate that the person presiding "at the trial" shall be a compulsory witness and at the same time and in the same proceeding be the judge of his own testimony. There was no evidence upon the subject of attorney's fees; and there was no stipulation fixing the amount of an attorney's fee; and therefore to allow an attorney's fee is to repudiate an express ruling made less than one year ago and after the most careful and deliberate consideration in *Columbia River Door Co. v. Todd*, 90 Or. 147 (175 Pac. 443, 860), as well as to overrule every precedent dealing with the subject: *McInnis v. Buchanan*, 53 Or. 533, 542 (99 Pac. 929); *Sattler v. Knapp*, 60 Or. 466 (120 Pac. 2). The judgment appealed from is modified by striking out the item of \$300 for attorney's fee.

MODIFIED.

BENSON, BURNETT and JOHNS, JJ., concur.

Argued July 9, reversed and suit dismissed July 29, rehearing denied September 16, 1919.

McCRACKEN v. BAY CITY LAND CO.*

(183 Pac. 9.)

Vendor and Purchaser—Tender—What Constitutes.

1. Plaintiff's letter inquiring what balance remained to be paid on a land contract and expressing a desire to secure a deed as soon as possible, held insufficient to show a tender of amount due under the contract.

*On right of vendee to rescind executory contract for sale of land because of vendor's breach of covenant to make improvements, see notes in 21 L. R. A. (N. S.) 823; L. R. A. 1917B, 403. **REPORTER.**

Vendor and Purchaser—Rescission of Contract—Independent Covenant.

2. A vendor's agreement to clear the lots, grade street, and lay a water-main *held* an independent covenant not authorizing the purchaser to rescind contract upon its breach.

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 1.

This is a suit to rescind a contract for the purchase of three lots in Central Addition to Bay City, the vendee being plaintiff, and the vendor defendant. The contract, which is set out in full in the complaint, provides for monthly payments, and *inter alia*, contains the following clause:

“The first party agrees to cut and grade the street at the present level in front of the said lots, and to lay a water main along the said street in front of the said lots, and to clear the said lots. All of these improvements to be delivered free and without cost to the second party. This agreement is a part of the contract to which it is attached.”

The last sentence of the quotation may be explained by saying that the instrument was a printed form which did not contain such a stipulation, and was added as a “rider” upon the insistent demand of the plaintiff, before he would execute the agreement. It is further alleged that plaintiff has duly performed all the conditions on his part, except that there was a balance of \$6 as principal and \$9.44 accrued interest due on September 20, 1917, and that as to these amounts, he tendered and offered, in writing, to pay, and to receive a deed to the premises, and that in reply to said offer, he received a letter from defendant stating that it was unable to deliver a deed to said premises until the 30th of November, as it was unable to secure a release from a trust deed covering the

premises prior to that time. It is averred that this letter was the first notice plaintiff had, that the property was encumbered, and that at all times prior thereto, defendant had fraudulently concealed from plaintiff the fact that the lots were covered by a mortgage or a trust deed; that immediately after receipt of such letter, plaintiff, for the first time, went to Bay City and inspected the premises, thereby discovering for the first time, that defendant had failed to clear the lots, grade the street, or lay the water-main in front of the property. After pleading his reliance upon the terms of the contract, the freedom of the lots from encumbrance, etc., plaintiff declares that but for such covenants he would not have made the payments which were made. Then follow these paragraphs:

“That by reason of the failure of defendant to furnish plaintiff a deed to said premises (to clear said lots from trees, stumps, etc., to grade the streets so as to make it possible for plaintiff to have a means of ingress and egress to said premises, and to lay in the street in front of and adjacent to said premises a water-main for the purpose of furnishing the plaintiff water for domestic purposes), the premises described in the said contract of sale are rendered totally worthless and useless to plaintiff.

“That among other terms and conditions of said contract it is stipulated that time is the essence of said agreement and immediately upon discovery that defendant had falsely and fraudulently concealed from plaintiff the fact that said premises were mortgaged, and that defendant would be unable to execute a deed (upon the payment of the last installment due on Sept. 20, 1917, and upon discovery of the fact that defendant had failed and neglected to clear the lots and to grade the streets in front of and adjacent thereto and to lay the water-mains along said streets in front of and adjacent to said lots), the plaintiff notified the defendant in writing that he would elect to rescind the

said contract and receive back from defendant the payments on account thereof with interest, and thereupon duly tendered to defendant a Quitclaim Deed to said premises, which defendant refused and now refuses to accept."

These are followed by an itemized statement of the payments made, amounting to \$1,355.88, his demand therefor, and defendant's refusal.

The answer admits the execution of the contract as set up in the complaint, admits the payments as therein alleged, and after some denials, pleads affirmatively, that there was no time specified in which the improvements named in the agreement were to be undertaken and completed; that prior to and at the time of the execution thereof it was agreed between the parties that such improvements were not to be made until plaintiff was ready to go upon and occupy the land, and that notice of his intention to do so should first be given by him to defendant; that plaintiff has not gone upon the premises to use them, and has never notified defendant of any intention to do so; that under the terms of the contract, the final installment of the purchase price, \$6, with accrued interest in the sum of \$9.44 became due and payable on September 20, 1917; that plaintiff has failed and refused to pay the same or any part thereof; that defendant is now, and at all times has been ready, able and willing upon payment of the unpaid balance, to deliver to plaintiff a good and sufficient warranty deed, and that such a conveyance has been duly prepared and tendered to plaintiff upon payment of such balance; that defendant has at all times, complied with the terms of the contract, and now is ready, able and willing to perform all of the terms and conditions thereof.

The reply admits the tender of the deed and denies generally the other allegations of the affirmative answer. There was a trial and a decree in favor of plaintiff, from which defendant appeals.

REVERSED AND SUIT DISMISSED.

For appellant there was a brief over the names of *Mr. H. T. Botts* and *Mr. John L. Bozorth*, with an oral argument by *Mr. Botts*.

For respondent there was a brief and an oral argument by *Mr. Wm. H. Trindle*.

BENSON, J.—There are two questions presented upon the appeal. The plaintiff bases his right of recovery, first, upon the theory that early in September he tendered the balance due upon his contract and demanded his deed, but that defendant replied that it would be unable to deliver the same, for the reason that it could not, prior to November 30th, secure a release of the land from the lien of a certain trust deed. The question raised upon this proposition is: Was there such a tender of payment of the purchase price as would put defendant in default by failure to make conveyance?

1. The second proposition upon which plaintiff relies is that the agreement to clear the lots, grade the street, and lay the water-main was a dependent covenant, a failure to perform which would entitle him to rescind. Considering these in the order thus indicated, we note that the evidence of a tender of the purchase price is as follows: On September 12, 1917, plaintiff wrote and mailed to defendant a letter in these words:

"Salem, Ore. 9/12, 1917.

"Bay City Land Co.,

"Portland, Ore.

"Gentlemen:

"I will be glad if you will please inform me how near finished my payments are as I have received no notice for Sept. If I am not mistaken there is not much more to pay and I'm anxious to get my deed and have it done with. Hope to hear soon and that your part of the contract is also fulfilled so I may have clear title. Let me hear at once and also if there is any chance to sell it and oblige,

"Respectfully,

"LEE McCRACKEN,

"2610 Maple Ave., Salem, Ore."

The plaintiff testifies that he wrote another letter to defendant, a few days later, in which he inquired as to whether or not the clearing and street grading had been done, and the water-main laid, and also, "that I was ready to make a payment or to complete payments on the property and finish up the payments when I found out what it was."

This constitutes all of the evidence of a tender. It will be observed that no specific sum is mentioned, and the letter does not offer to pay any sum whatever. The requirements of a sufficient tender in this respect are stated in Hunt on Tender, Section 238, thus:

"In making a tender of money, whether the actual production be dispensed with or not, the tenderer must name the sum which he tenders. Thus, where the person who made the tender had two bank notes twisted up in his hand, enclosing four sovereigns and 19s, 8d, in change, making the precise sum intended to be paid, and the party, without opening it, informed the creditor of the amount, the tender was held good. **BEST, C. J.**, said: 'If he had not mentioned the amount, I think it would not have done.' So, in another case, a debtor in passing his creditor said: 'I want to tender

you this money, * * for labor you have done me,' at the same time holding in his hand a sum equal to the indebtedness, but named no sum, it was held insufficient."

The rule is stated in 38 Cyc. 137, thus:

"Nothing short of an offer of everything that the creditor is entitled to receive is sufficient and a debtor must at his peril tender the entire sum due, including all necessary expenses incurred or damages suffered by the creditor by reason of the default of the debtor, and a mistake in tendering an amount less than the sum due is the misfortune of the tenderer, and the position of the parties remains the same as if no tender had been made. Furthermore, the tenderer must name the sum which he wishes to tender, unless perhaps the exact sum and interest is tendered so that the tenderee may easily satisfy himself that the amount is correct. Where the amount due is within the exclusive knowledge of the creditor, and the creditor on demand neglects or refuses to indicate the correct amount that is due, the debtor may tender so much as he thinks is justly due, and if less than the true amount, the tender nevertheless will be good; and the same rule obtains where the tenderee deprives the tenderer of the means of ascertaining the exact amount due."

The evidence falls far short of these requirements, and we conclude, therefore, that the plaintiff's first contention must fail.

2. Plaintiff's second proposition is, that defendant's promise to clear the lots, grade the street, and lay a water-main, is a dependent covenant, for the breach of which he is entitled to a rescission, and this is the conclusion reached by the trial court. The distinction between dependent and independent covenants is sometimes very shadowy, and frequently is difficult to determine. There is a dearth of authority

upon the specific question as to the right of a vendee to rescind an executory contract for the sale of land upon the vendor's breach of covenant to make improvements, but we have carefully examined all to which our attention has been directed. The case of *Crompton v. McLaughlin Realty Co.*, 51 Wash. 525 (99 Pac. 586, 21 L. R. A. (N. S.) 823), appears to be a leading case upon the subject and contains a very full discussion of the problems involved, citing, and quoting copiously, from all of the available cases bearing upon the subject. This was a case wherein the plaintiff had entered into a contract with the defendant, whereby he agreed to purchase certain real property for the sum of \$2,400 in installments, the first payment to be made October 22, 1906, and the last falling due on October 22, 1908. The agreement contained certain building restrictions, and the following covenant:

"Said first parties agree that they will, free of cost to said second party, put in the necessary cement sidewalks, sewer and water-mains and pave the abutting street, within one year from the date hereof."

Plaintiffs made the required payments until the time arrived for making one which became due on October 22, 1907, which was not made, and on October 23d, notified defendants that they elected to rescind the contract for failure on the part of the defendants to put in the cement sidewalks, sewer and water-mains, and pave the abutting streets within one year from the date of the contract, which had been executed on October 22, 1906. The action was then instituted to recover the installments paid. There were other issues raised by the pleadings, but Mr. Chief Justice RUDKIN, in the opinion, says:

"Regardless of the merits of these respective contentions, we think there are other reasons why the judgment should be affirmed. The numerous covenants contained in this contract, aside from the covenant to convey and the covenant to pay the purchase price, are wholly independent of each other, and the only remedy for a breach of such covenants is an action for damages. It is sometimes difficult to determine whether covenants are dependent or independent, but we think the covenants contained in this contract in relation to building restrictions, improvements, etc., are clearly of the latter class."

In support of this conclusion, the opinion quotes from the following cases which support the same fully: 9 Cyc. 642; *Hunt v. Tibbetts*, 70 Me. 221; *Turner v. Mellier*, 59 Mo. 526; *American Emigrant Co. v. County of Adams*, 100 U. S. 61 (25 L. Ed. 563, see, also, Rose's U. S. Notes); *Tipton v. Feitner*, 20 N. Y. 423; *Front Street etc. R. Co. v. Butler*, 50 Cal. 574.

In *American Emigrant Co. v. County of Adams*, 100 U. S. 61 (25 L. Ed. 563), the rule is stated thus:

"The allegations of the bill to the effect that the Emigrant Company has not fulfilled its engagements with respect to the drainage and settlement of the land, rest in covenant merely, and afford no ground for avoiding the contract. Where covenants are mutual and dependent, the failure of one party to perform absolves the other and authorizes him to rescind the contract. But here the contract was largely carried into execution soon after its inception. The engagements of the appellants to introduce settlers and the like were to be performed in the future; and their performance was not a condition, but, as before stated, rested in covenant. In case of a breach, they would lay the foundation of an action, but nothing more."

In the State of Washington, the case of *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525 (99 Pac. 586,

21 L. R. A. (N. S.) 823), has been followed in a number of cases. In *Toellner v. McGinnis*, 55 Wash. 430 (104 Pac. 641, 24 L. R. A. (N. S.) 1082), Mr. Justice CHADWICK says:

“*Crompton v. McLaughlin Realty Company* has nothing in common with this case. The covenants in that contract were clearly independent under any rule.”

And again, in *Spokane Canal Co. v. Coffman*, 54 Wash. 645, 648 (103 Pac. 1106, 1107), Mr. Justice MOUNT says:

“In *Crompton v. McLaughlin Realty Co.*, 51 Wash. 525 (99 Pac. 586, 21 L. R. A. (N. S.) 823), we held that covenants to put in sidewalks and other improvements contained in a contract for the sale of real estate were independent covenants. The rule in that case is decisive of this. In this case the promise to pay the purchase price of the land did not depend upon the promise to furnish water at stated times. The latter promise is to be performed after the purchase price is fully paid. It was an independent continuing contract. The fact that the covenant to furnish water was to be performed before all the payments were made was a mere coincidence. The payments were not made dependent thereon.”

Counsel for plaintiff contends that this court is committed to a contrary doctrine by the views expressed in *Miller v. Beck*, 72 Or. 140 (142 Pac. 603); *Potter Realty Co. v. Derby*, 75 Or. 563 (147 Pac. 548), and *Stewart v. Mann*, 85 Or. 68 (165 Pac. 590, 1169). We shall therefore give special attention to these cases.

Miller v. Beck, 72 Or. 140 (142 Pac. 603), was a case wherein there was a contract for the sale of:

“All of tracts numbered twenty-four (24) and twenty-five (25) of the Dimick Homestead Tracts, which said tracts are duly recorded in the office of the county recorder of said Marion County, Oregon; also

a right of way for road purposes along tracts 32 and 33 of said Dimick Homestead Tracts, until such time as the twenty-foot road along the front of said tracts numbered 24 and 25 shall have been opened."

The right of way along the front of tracts 32 and 33 was subsequently closed, and the vendor refused to open one along the front of tracts 24 and 25. Upon these facts this court held that the vendee was entitled to rescind, saying, by Mr. Justice BURNETT:

"Miller engaged to buy, and the company obligated itself to sell, not only the two lots, but also 'a right of way for road purposes along tracts 32 and 33 until * * such time as the twenty-foot road along the front of tracts numbered 24 and 25 shall have been opened.'"

It was held that these facts justified rescission. A mere statement of the facts differentiates it from the instant case.

Potter Realty Co. v. Derby, 75 Or. 563 (147 Pac. 548), was a case wherein the plaintiff had undertaken to create a summer resort city. It was an action brought to recover delinquent installments of the purchase price. From the contract itself, it appears that the improvement of the entire town site, to the extent of \$100,000 per year until the very extensive improvements therein described should have been fully completed, was the principal consideration. The record discloses that no such improvements had been made, that the only market value that the land had or could have, depended entirely upon the completion of such improvements, and that the plaintiff was an insolvent company, totally unable to perform. There was no question of rescission in the case, and the decision was based upon the language of the contract itself, wherein it was agreed that in the event of default in payment of any installment of the purchase price all payments

theretofore made should be forfeited to the seller and the contract should become void as to both parties without notice. This court simply held both parties to the exact terms of the contract as thus expressed, permitting the seller to keep all the payments it had received, but denying it the right to collect any more, and so the case does not decide the question which now confronts us.

The case of *Stewart v. Mann*, 85 Or. 68 (165 Pac. 590, 1169), does not in any manner discuss the problem which we are considering. The situation there was one wherein the vendee insisted, not upon a rescission, but upon an abatement in the purchase price because the fruit trees upon the land had not been cared for as stipulated in the contract, which demand was answered, by the assignee of the original vendor, by returning to the purchaser the payments received subsequent to the assignment, and repudiating all obligations under the contract. This court rendered a decree awarding plaintiff a decree for the return of his payments, because the *vendor* had repudiated the contract. These cases, therefore, are of no assistance in the consideration of the present case. The facts here are substantially like those in *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525 (99 Pac. 586, 21 L. R. A. (N. S.) 823), and the evidence discloses that an expenditure of \$200 in a very short time would supply the improvements for which the contract calls, and the breach is one that may be readily compensated in damages. We think it is clearly an instance of an independent covenant, for which there can be no rescission. The decree is reversed, and one will be entered dismissing the suit. REVERSED AND SUIT DISMISSED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ.,
concur.

Argued June 26, affirmed July 29, rehearing denied September 16, 1919.

HINKSON v. KANSAS CITY LIFE INS. CO.

(183 Pac. 24.)

Insurance—Authority of Agent to Receive Premiums—Instructions.

1. An instruction relative to authority of a general state agent of an insurance company to accept payment of premiums, "but you are further instructed that, if the officers had an opportunity to inform themselves of the facts and circumstances * * and failed to do so, it would be equivalent to such knowledge," was erroneous, being too broad; the mere opportunity to acquire knowledge not being equivalent to knowledge.

Insurance—Authority of Agent—Payment of Premiums.

2. Where an insurance company ratified the unauthorized act of a general state agent in accepting notes in payment of premiums and granting extensions, it became a question of fact as to whether the company, by such acts and conduct, had authorized and empowered the general agent to make and accept other premium notes and grant other extensions.

Insurance—Authority of Agent—Question for Jury.

3. In an action against an insurance company to recover premiums paid, where insurance company had cancelled the policies, whether defendant's general state agent had apparent authority to accept premium notes and grant extensions, contrary to the provisions of a life policy, *held* for the jury.

Insurance—Life Insurance—Failure to Pay Premiums.

4. Where the premium on a life insurance policy is not paid when due, and the payment thereof is not waived or extended by the insurer, the insurer may cancel the policy and retain premiums paid.

[As to effect of failure to pay periodical premiums on policy of life insurance to terminate same in absence of provision for forfeiture, see notes in 26 L. R. A. (N. S.) 747; L. R. A. 1917B, 214.]

Insurance—Life Insurance—Failure to Pay Premiums—Lapse of Policy.

5. If a renewal premium was paid or extended by the execution of a premium note, and such note was not paid at maturity or at time to which it was extended, if extended, the insurer could cancel the policy.

Insurance—Failure to Pay Premiums.

6. A policy of life insurance automatically lapses without any further action on the part of the insurer, if the insured fails to pay a premium when the same becomes due, and within the time allowed by the terms of the policy.

Insurance—Life Insurance—Time.

7. Time is of the essence of a life insurance contract, and if insured fails to perform any condition on the date when it is due to be performed, then, without any further notice or act of the insurer, the policy lapses automatically, where no leeway or days of grace are allowed the insured.

Insurance—Insurance Agent's Authority—Receiving Premiums.

8. To establish that an agent outside of the home office of the insurance company had authority to accept renewal premiums on behalf of the company, it must be proved that either such agent was actually authorized by insurance company, or by his contract from the home office, or that the insurance company represented or held out the agent as having the authority; and also that the insured knew of and relied on the representations.

Insurance—Authority of Agent—Ratification of Unauthorized Act.

9. No payment of premiums to other than an authorized agent of an insurance company, or one held out as having authority, can be considered as a valid premium payment, unless the same was actually received by and consented to and ratified by the insurer.

Insurance—Agency—Proof—Declarations of Agent.

10. A declaration or statement made by an agent of an insurance company to the effect that he is authorized to collect premiums is of no effect and not binding upon the company.

Trial—Instructions—Construction.

11. It is not prejudicial error to give an incorrect instruction where, in view of the other instructions given and the testimony in the case, the jury could not have been misled.

Insurance—Wrongful Cancellation of Policy—Recovery of Premiums—Amount.

12. If an insurance company wrongfully declared a policy forfeited and refused to accept a premium when duly tendered, the insured may consider the policy at an end and bring an action to recover the just value of the policy, in which case the measure of damages is the amount of premiums paid with interest on each from the time it was made.

Insurance—Limitation of Authority—Validity.

13. Provisions in a life insurance policy to effect that agents shall not have authority to collect renewal premiums, and that company shall not be responsible for act of agent in accepting notes and extending payment thereon, are valid and binding between the insurer and the insured.

Insurance—Limitation of Authority of Agent—Waiver.

14. Provisions in a policy of life insurance limiting authority of agent and providing that agent has no authority to accept renewal premiums or accept notes, or grant extensions, etc., may be waived or modified by the insurer.

From Lane: GEORGE F. SKIPWORTH, Judge.

In Banc.

In April, 1917, plaintiff filed his complaint in case No. 10,810, alleging that the defendant is a Missouri life insurance corporation, duly licensed to transact business in this state; that on March 31, 1914, plaintiff made application for a \$10,000 policy with an annual premium of \$400; that at the time of the application he paid the first premium, in consideration of which the defendant agreed that if it did not deliver the policy it would return the money; that defendant has never delivered the policy but has retained the payment and that at the time of the application the defendant through L. V. Rawlings, its agent, executed its receipt for the payment, a copy of which is attached to the complaint as Exhibit "A."

The defendant admits its corporate nature and the application for the policy, that it has never delivered the policy and that Rawlings was its duly authorized agent, but denies the \$400 payment or that it agreed to return the money. As a further and separate answer it alleges that at the time the application was made the plaintiff delivered to Rawlings his promissory note for \$400, which was held by Rawlings until final action should be taken on the application; that after the application was made, the plaintiff, without any valid excuse or reason, did not present himself for medical or physical examination, and that no part of the note has ever been paid. In his reply the plaintiff specifically denies all of the new matter in the answer.

On August 24, 1917, the plaintiff commenced action number 10,811, in which he alleges that at his request the defendant issued its \$5,000 policy No. 45,064 payable to the wife of plaintiff, by the terms of which the

plaintiff should pay the annual premium of \$184.10 in advance on December 8th of each year, with one month's grace. The complaint states that:

"The first year's premium only may be paid to the agent. All subsequent premiums are due and payable in advance at the home office of the company without notice. However, they may be paid to an authorized agent of the company on or before the date when due, but only in exchange for a receipt signed by the president, vice-president, secretary or assistant secretary and countersigned by such agent. Upon failure to pay any premium on or before the date when due, or upon failure to pay any premium note when due, this policy will become null and void without any action or notice by the company, and all rights shall be forfeited to the company, except as hereinafter provided. No agent has power on behalf of the company to modify this contract, to extend the time of payment of the premiums, to waive any forfeiture, to bind the company by making any promise or representation, or to deliver any policy contrary to the provisions of section one (1) hereof. These powers can be executed only by the president, vice-president, secretary or assistant secretary of the company and will not be delegated."

It is further averred that:

"L. V. Rawlings was the general agent of the defendant corporation in Oregon and had charge of all of its business in Oregon, and as such general agent had the power from the defendant corporation to waive and modify each and all of the foregoing quoted conditions of the said policy and the said defendant corporation through its said general agent did waive or modify all of the said stated conditions of the said policy, except as herein expressed."

It is then alleged that the plaintiff paid the defendant the annual premium of \$184.10 on December 8th of the years 1909, 1910 and 1911; that on December

8, 1912, he executed to the defendant his note for \$184.10 with interest at 6 per cent, for an extension of time to June 8th following, within which to pay the premium which became due on December 8, 1912; that before the maturity of the note the defendant granted a further extension and on July 2, 1913, the plaintiff paid the note with accrued interest, amounting to \$190.18; that on December 12, 1913, he paid the yearly premium which became due on December 8th of that year, and that by the terms of the policy no further premium would be due until December 8, 1914. The plaintiff says that he has paid to the defendant the sum of \$920.50 in premiums on the said policy, all of which the defendant accepted through its general agent, Rawlings, and still holds and retains.

It is contended in the complaint that the plaintiff had fully kept and performed all of the terms and conditions of the policy except those which were waived or modified, until March 20, 1914, when the defendant notified him that it had rescinded and canceled the policy, at which time the plaintiff asked for a return of the premiums which he had paid and the defendant refused to make payment. The plaintiff alleges that he is the owner and holder of the policy and offers to return it to the defendant.

For a further and separate cause of action the plaintiff alleges that on December 8, 1909, on like terms and conditions the defendant issued to him its certain other policy, No. 45,065, for \$5,000, upon which he paid like annual premiums of \$184.10 for the years 1909, 1910 and 1911; that on December 8, 1912, to procure an extension to June 8, 1913, he executed his premium note bearing 6 per cent interest; that before the maturity thereof he obtained a further extension to July 2, 1913, when he paid the principal and

interest, amounting to \$190.18; that on December 8, 1913, another premium became due and he paid it four days later, and that no further premium fell due until December 8, 1914. It is further alleged that on March 20, 1914, this policy was wrongfully canceled; that the defendant accepted through its agent and now retains all of the payments made on account of annual premiums, amounting to \$926.68, and that the plaintiff has tendered the policy and demanded a return of his premiums.

The defendant admits the execution of policy No. 45,064 and the terms and conditions therein stated, as alleged. "Defendant further admits that L. V. Rawlings was the general agent of the defendant corporation in Oregon"; that "premiums were paid on said policy, carrying the same until December 8, 1912"; and that plaintiff "executed notes to this defendant becoming due December 8, 1913." All other material allegations of the complaint are denied, and as a further and separate answer the defendant alleges that among other things the policy provides that if the annual premiums were not promptly paid when due, the policy should lapse and "the premium payments made thereon should be forfeited to the company" without any further right on the part of the insured, the beneficiary or their assigns, against the corporation; that all premiums should be payable in advance at the home office, although they might be paid to an authorized agent before maturity, but only in exchange "for a receipt signed by the president, vice-president, secretary or assistant secretary and countersigned by such agent"; that "the plaintiff paid premiums on said policy and kept the same in force until the eighth day of December, 1912"; that thereafter the plaintiff executed his note payable June 8,

1913, for the amount of the premium due on December 8, 1913; that no part of said note has ever been paid; that since December 8, 1912, the plaintiff has not made any payments on the policy and that by reason thereof it has elapsed and all payments made thereon have been declared forfeited to the company.

A similar answer was made to the plaintiff's second cause of action, on policy No. 45,065, and to each answer he filed a general denial.

On August 24, 1917, the plaintiff commenced another action, No. 10,812, in which it is alleged that on February 14, 1911, the defendant issued to him its certain other \$5,000 policy, No. 51,753, by the terms of which the annual premium of \$192.65 was to be paid in advance on February 14th of each year. It is averred that this policy also contained the same terms and provisions set forth and alleged by the plaintiff in his complaint in case No. 10,811; that L. V. Rawlings was the general agent of the defendant and that as such he had power to waive or modify and did waive and modify all of the provisions above quoted. It is then alleged that the plaintiff paid the premium of \$192.65 on February 14, 1911; that on February 14th of the year following, when the second premium was due, he was granted an extension of time to March 20, 1912, when he made the payment and it was accepted by the defendant as of February 14, 1912; that when the premium of February 14, 1913, became due, the plaintiff was granted another extension within which to make payment; that he paid the same on July 2, 1913, with interest, amounting to \$120.49; that on January 13, 1914, he paid the defendant \$69.02, which discharged the premium in full to that date and was so accepted by the defendant; that on the latter date he made a further payment of \$192.65 for the pre-

mium falling due on February 14th of that year; that by the terms of the policy no further premium became due until February 14, 1915, and that the plaintiff paid to the defendant \$766.66 in premiums upon the said policy, all of which the latter accepted through its general agent and now holds and retains.

It is next alleged that the plaintiff performed his part of the contract except as to the said conditions which were waived or modified as stated; that on March 20, 1914, the defendant wrongfully canceled the policy, and that by reason thereof the plaintiff offered to return it and demanded a refund of the amounts paid by him as premiums, which the defendant refused.

As another cause of action, the plaintiff alleges that on December 30, 1911, for value the defendant issued to him its certain other policy, No. 58,193, for \$10,000, and that the premium thereon was \$393.20, payable annually in advance on December 30th. In like manner the terms and conditions of the policy are pleaded, also that Rawlings was the general agent of the company with authority to waive and that he did waive or modify the conditions above noted. The plaintiff claims that he paid the annual premium on December 30, 1911, and alleges that when the second premium became due on December 30th of the year following he executed a 90-day note therefor, which was extended and paid with accrued interest on December 12, 1913; that when the third premium fell due he paid it within the one-month period of grace, on January 30, 1914; that the amounts so paid aggregated \$1,202.01, and that all of such payments were made and accepted through the general agent of the defendant. Like allegations are made as to the cancellation of the policy

in March, 1914, plaintiff's ownership of the policy and his demand for a return of the premiums.

By way of answer to the first cause of action in case No. 10,812, on account of policy No. 51,753, the defendant admits the execution and delivery of the policy and the amount of the annual premium; that the policy contained the provisions alleged in the complaint; that "L. V. Rawlings was the general agent of the defendant corporation in Oregon"; that payment of the first annual premium was made as stated and continued the policy in force until May 14, 1912, with a quarterly payment; but specifically denies all other material allegations of the complaint and pleads the same affirmative defense as to nonpayment and forfeiture.

As to the second cause of action, on policy 58,193, the defendant admits the payment of the first premium; that on December 30, 1912, the plaintiff executed his note to the defendant for \$393.20 and that the same was extended. As a further and separate answer it admits the execution of the note maturing March 30th and that it was renewed and extended until September 30, 1913.

The reply traversed all material allegations of both answers.

On November 7, 1917, the court made an order that the different cases should be consolidated, "the various actions to be tried as separate causes of action in the same case, and all the questions involved in the three cases to be submitted to the jury in this one trial."

When the plaintiff rested his case in chief the defendant moved to strike out all the evidence introduced by the plaintiff, "on the ground that the same had not been connected up with the company, but that all payments shown were made to L. V. Rawlings, who

was without authority to receive the same for the company." The defendant also moved for a nonsuit, "on the ground that plaintiff by his own evidence had failed to establish a case against the defendant for recovery of the claim sued for." The motions were overruled.

After both parties had rested, the defendant moved for a directed verdict, "except as to case No. 10,810, on the ground that there was no evidence at all showing authority in Rawlings, either to accept premium payments on behalf of defendant or to extend the time for their payment." This motion also was overruled and an exception allowed. The jury returned a verdict against the defendant for \$5,504.82, the full amount of plaintiff's claim. At the same time it made and returned the following special verdict on question submitted to it by the court:

"Question one: How much is plaintiff entitled to recover in case No. 10,810?

"Answer: We, the jury, answer that the plaintiff is entitled to recover \$487.20 in case 10,810.

"Question two: How much is the plaintiff entitled to recover in case No. 10,811?

"Answer: We, the jury, answer that the plaintiff is entitled to recover \$2,477.86 in case 10,811.

"Question three: How much is the plaintiff entitled to recover in case No. 10,812?

"Answer: We, the jury, answer that the plaintiff is entitled to recover \$2,539.76 in case 10,812."

A single judgment was entered on the verdict, for the full amount. The defendant then filed a motion for judgment notwithstanding the verdict or, in the alternative, that the judgment be set aside and a new trial be granted, for the reason that there was no competent evidence upon which to base the verdict; that it was against the law of the case, and for errors

which occurred at the trial, to which exceptions were duly taken. The motions were overruled and the defendant appealed, making forty-five different assignments of error, claiming that the court erred in the admission of any testimony concerning the payment of premiums to Rawlings and the extension and acceptance of overdue premiums by him, because he had no authority to accept payments or to grant such extensions and his unauthorized acts were never ratified or approved by the company; that all of the evidence introduced by the plaintiff as to payments to Rawlings or extensions thereof should have been struck from the record; that the court erred in overruling the motion for a nonsuit and in refusing to direct a verdict for the defendant on cases 10,811 and 10,812, and in giving a number of different instructions and refusing to give certain other instructions requested by the defendant.

The vital questions are whether L. V. Rawlings was authorized to accept payment of premiums after they became due, to take notes for such premiums, to grant extensions of time for the payment of such premium notes or to accept payment thereon; whether as such agent he had the power from the defendant to waive or modify the written provisions in the policies as to how, when and to whom the premiums should be paid, and whether there was sufficient evidence to submit the case to the jury.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Wood, Montague, Hunt & Cookingham* and *Mr. Guy C. H. Corliss*, with oral arguments by *Mr. P. W. Cookingham* and *Mr. Corliss*.

For respondent there was a brief and an oral argument by *Mr. H. E. Slattery*.

JOHNS, J.—It appears from the corporate records of the home office of the company that the following cash payments were made on plaintiff's policies:

Number 45,064.

December 13, 1909.....	\$184.10
January 6, 1911.....	48.80
January 30, 1911.....	48.80
February 6, 1911.....	89.27
January 18, 1912.....	95.75
July 26, 1912.....	48.80
October 21, 1912.....	48.80

Number 45,065.

December 13, 1909.....	\$184.10
January 6, 1911.....	48.80
January 30, 1911.....	48.80
February 6, 1911.....	89.27
January 18, 1912.....	95.75
July 26, 1912.....	48.80
October 21, 1912.....	48.80

Number 51,753.

February 25, 1911.....	\$192.65
April 9, 1912.....	51.10

Number 58,193.

December 30, 1911.....	\$393.20
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It is alleged and admitted that "L. V. Rawlings was the general agent of the defendant corporation in Oregon." The plaintiff testified that all of his payments were made to Rawlings and there is no claim or pretense that he ever made any payment in strict accord with the specific terms and provisions of the policy. It appears from the records kept at the defendant's home office that the plaintiff made his last payment on policy 45,064 on October 21, 1912, which extended that policy to December 8th of the same year, and at the

same time he made payment on policy 45,065, extending it to the same date; that on policy 51,753 the last payment was made on April 9, 1912, keeping that policy in force until May 14th of the same year; and that on policy 58,193 the annual premium was paid on December 30, 1911, extending that policy to the same date in 1912.

"For failure to pay premiums" all of the plaintiff's policies were canceled on March 20, 1914. There is nothing in the record which tends to show that the home office of the company directly notified the plaintiff at any time prior to March 20, 1914, that he was in default in the payment of any of his premiums, and so far as the record discloses, its letter of that date was the first communication which the home office mailed to the plaintiff.

The files of the insurance commissioner of the State of Oregon show that between September 25, 1909, and February 10, 1914, at different times the defendant made a number of applications for agents' licenses authorizing representatives to do life insurance business for it in this state; that each application for such licenses is dated and signed by "L. V. Rawlings, secretary or manager"; and that based upon these applications licenses were issued to a number of different individuals as agents of the company. It is undisputed that Rawlings had authority to, and did, appoint all of such agents; further, that Edith P. Richardson was appointed cashier of the company by the home office and that her office was in Portland, in the same room with that of Rawlings.

Several checks issued by the plaintiff to and in favor of L. V. Rawlings were introduced in evidence for the purpose of showing payments of the respective premiums on the different policies. These checks were

indorsed by "L. V. Rawlings" and "L. V. Rawlings, General Agent."

It is shown by the records of the home office of the defendant that the total amount of payments which the defendant admits receiving as premiums on the different policies was \$1,765.59, paid on and between December 13, 1909, and October 21, 1912. It appears from the dates of such payments that extensions from time to time must have been granted by someone. The annual premium on policy 45,064, which should have been paid on December 8th of each year, was \$184.10, with one month's grace allowed, and a premium which should have been paid on December 8, 1910, was paid as follows: January 6, 1911, \$48.80; January 30, 1911, \$48.80; February 6, 1911, \$89.27. Payments for the next year's premium were made as follows: January 18, 1912, \$95.75; July 26, 1912, \$48.80; October 21, 1912, \$48.80. The same payments on the identical dates were made on policy 45,065. A quarterly payment of \$51.10 was made on policy 51,753 on April 9, 1912, by which that policy was extended to May 14, 1912. The plaintiff and the defendant agree as to the time and amount of these payments.

It is expressly provided in the policies that "all subsequent premiums are due and payable in advance at the home office of the company without notice"; that "they may be paid to an authorized agent of the company on or before the date when due, but only in exchange for a receipt signed by the president, vice-president, secretary or assistant secretary and countersigned by such agent"; that "upon failure to pay any premium on or before the date when due, or upon failure to pay any premium note when due, this policy will become null and void, without any action or notice by the company"; and that "no agent has power on

behalf of the company to modify this contract, to extend the time of payment of the premiums, to waive any forfeiture or to bind the company by making any promise or representation. * * These powers can be executed only by the president, vice-president, secretary or assistant secretary of the company and will not be delegated." Yet in the face of such provisions, it appears from its own records that the defendant did accept the payment of a number of premiums after they became due and payable, and that extensions of time must have been granted the plaintiff for the payment of such premiums. He testifies that all of these payments were made to Rawlings. In 4 Words and Phrases, page 3048, it is said:

"A general agent is one who is employed to transact every business of a particular kind. * * A general agent is an agent who is empowered to transact all the business of his principal of a particular kind or in a particular place. * * A general agency exists when there is a delegation to do all acts connected with a particular trade, business or employment. * * General agency implies authority in the agent to act generally in all the business usually conducted by the principal. * * The terms 'general agent' and 'special agent' are relative. An agent may have power to act for his principal in all matters. He is then strictly a general agent. He may have power to act for him in particular matters. He is then a special agent."

As to policy 45,064, the plaintiff alleges that on December 8, 1912, to procure an extension to June 8, 1913, he executed his promissory note to the defendant for \$184.10; that before the maturity of the note he obtained a further extension to July 2, 1913, at which time he paid the note with accrued interest, and that on December 8, 1913, another annual premium became due, which he paid four days later. Similar allega-

tions are made concerning policy 45,065. As to policy 51,753 the plaintiff alleges that when the second premium became due on February 14, 1912, an extension was granted him until March 20, 1912, at which time the premium was paid; that when the third annual premium became due on February 14, 1913, the defendant granted an extension to July 2, 1913, when the plaintiff paid a part of the premium, and was granted a further extension to January 30, 1914, when he paid that premium in full; that on the same date he also paid in full the premium which would become due on February 14, 1914, and by reason thereof the policy would remain in force until February 14, 1915. The defendant denies all of such payments, but in its answers alleges and admits, as to policy 45,064, that "the plaintiff executed notes to this defendant becoming due December 8, 1913, * * which note was drawn to mature June 8, 1913"; and that "this note was extended and renewed until December 8, 1913." Identical admissions and allegations were made by the defendant as to policy 45,065. As to the second premium on policy 58,193, the defendant admits and alleges that "on the thirtieth day of December, 1912, plaintiff executed and delivered to the defendant his note for \$393.20, bearing 6 per cent interest, and that the time of payment was extended," also that the plaintiff "gave his note maturing March 30, 1913. Such note was renewed and extended until September 30, 1913." The defendant denies all other extensions and the execution of any other or different notes.

While it appears from the records in the home office of the defendant that policies 45,064 and 45,065 became subject to forfeiture on December 9, 1912, policy 51,753 on May 15, 1912, and policy 58,193 on January 1, 1913, it is significant that the only direct communication

from the defendant to the plaintiff was on March 20, 1914, when the defendant first notified him that the policies were canceled for nonpayment of premiums, and that on May 25, 1914, for the first time the defendant, through its president, notified its policy-holders that it had "discontinued the collection of renewal premiums" through its Portland office, and that:

"We will not recognize the receipt of any agent as evidence of the payment of a renewal premium. We therefore request that in the future renewal premiums be paid either direct to this office or in accordance with the premium notice which will be mailed you on or about the premium due date. The payment of renewal premiums to the Portland office, or any agent representing the Portland office, is confusing and might possibly be the means of your policy becoming delinquent. Mr. L. V. Rawlings has no authority to collect, receive or accept renewal premiums."

1. The instructions are very full and exhaustive, covering thirty typewritten pages. Complaint is made of the following charge on the subject of defendant's knowledge of the acts and conduct of Rawlings as its agent:

"But you are further instructed that if the officers of the company had an opportunity to inform themselves of the facts and circumstances relative to the payment of the premiums, and failed to do so, it would be equivalent to such knowledge."

It is apparent that this instruction is substantially copied from the opinion of this court in *Cranston v. West Coast Life Ins. Co.*, 72 Or. 116, 130 (142 Pac. 762), which cites Reinhard on Agency, Section 410. The trial court was justified in giving the instruction but such portion of that opinion was founded upon the authority of an agent to deliver a policy. It is somewhat broad when applied to the particular facts in

this case and is not sustained by the weight of authority. 1 Mechem on Agency, second edition, Section 403, reads thus:

“It must be kept in mind also that, where the law thus requires knowledge, it is ordinarily actual knowledge, and not merely the opportunity for acquiring knowledge, which is demanded. * * The principal where nothing has occurred to put him on his guard, is not bound to distrust his agent; he has the right to assume that the agent will not exceed his authority or practice fraud or commit crime; and he is not obliged, before accepting the benefits of an authorized act, to inquire whether, in performing it, the agent has not in some way violated his trust.”

Section 404 of the same volume is as follows:

“At the same time, however, the principal cannot be justified in willfully closing his eyes to knowledge. He cannot remain ignorant where he can do so only through intentional obtuseness. He cannot refuse to follow leads, where his failure to do so can only be explained upon the theory that he preferred not to know what an investigation would have disclosed. He cannot shut his eyes where he knows that irregularities have occurred. In such a case, he will either be charged with knowledge, or with a voluntary ratification with all the knowledge which he cared to have.”

Further quotations from the text are here set down:

“The facts, moreover, may be so patent that for the principal to profess ignorance would merely be to stultify himself. They may be so obvious that the principal, as a reasonable man, cannot be heard to say that he was ignorant of them. The duty to know them may be so interwoven with the proper conduct of the principal's business that he must, as an ordinary business man, be presumed to know them. This latter rule is constantly applied in the case of the directors of corporations, especially of banks, who are ordinarily presumed to know that which the proper performance of their duties would disclose.” (Section 405.)

"It must also be kept in mind that the existence of actual knowledge may be found by inference like any other fact. This is not 'imputed' knowledge or 'presumptive' knowledge; but the fact of knowledge may be found, like any other fact, either from direct evidence, or from the existence of other facts and circumstances from which the fact of actual knowledge may properly be inferred, as in other cases. Any duty of the agent to inform his principal might be taken into account in determining the fact." (Section 406.)

"It is a fundamental rule that, if the principal elects to ratify any part of the unauthorized act, he must, so far as it is entire, ratify the whole of it. He cannot avail himself of it so far as it is advantageous to him, and reject it as to the residue. He cannot take the benefits and repudiate the obligations; and this rule applies not only when his ratification is express but also when it is implied, if the requirement of knowledge is satisfied. * * " (Section 410.)

"It is, moreover, as has been seen, a rule of quite universal application that he who would avail himself of the advantages arising from the act of another in his behalf must so far as it is entire also assume its responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act he will not afterwards be heard to say that any portion of the act was unauthorized. * * " (Section 435.)

In 25 Cyc. we find the following:

"The company is chargeable with knowledge or notice possessed by its officers or which should be in their possession in the ordinary performance of their duties." (Page 863.)

"If, by its course of dealing with insured, or by its general course of business known to him, the company misleads him into believing that the strict terms of the policy as to payment of premiums will not be insisted upon, it cannot afterward take advantage of a forfeiture thus induced." (Page 867.)

The following excerpts are taken from 31 Cyc.:

“Knowledge is not to be imputed to a principal by reason of the mere fact that he had reasonable opportunity to acquire such knowledge.” (Page 1256.)

“As a general rule the fact of agency cannot be established by proof of the acts of the pretended agent, in the absence of evidence tending to show the principal’s knowledge of such acts, or assent to them. Yet when the acts are of such a character, and so continued, as to justify an inference that the principal knew of them, and would not have permitted the same if unauthorized, the acts themselves are competent evidence of agency.” (Page 1662.)

The case was tried by the plaintiff on the theory that Rawlings was the general agent of the defendant; that the plaintiff made all of his payments to him as alleged in the complaint; that by its actions, conduct and course of business the company had waived and modified the specific terms and provisions of the policy as to where, when and to whom the premium payments should be made, and by whom extensions should be granted; that the plaintiff relied thereon and that the defendant wrongfully canceled his policies, by reason of which he was entitled to recover the amount of the premiums which he paid, with interest. The defendant relied upon the specific terms of the policies and denied any waiver or modification thereof, the authority of Rawlings to receive renewal payments or grant extensions for such payments, that plaintiff had made payments other than those shown by the corporate records of the home office, that the defendant had received any notes other than those admitted, that Rawlings had any authority to take or receive premium notes, grant extensions thereon or that he was authorized to collect such notes, but alleged affirmatively that the plaintiff was in default as to his

premiums and that by reason thereof the defendant had the right to and did cancel his policies.

2. Rawlings was a general agent, and, assuming, as we must for the purposes of this opinion, that the plaintiff had all of his dealings with and made all of his payments to Rawlings, and the defendant having admitted that the plaintiff executed to it the four notes specified above and was granted the extensions thereon, coupled with the fact that the first direct communication to the plaintiff from the defendant's home office was on March 20, 1914, long after such notes were executed and such extensions were granted, it must follow that Rawlings took and accepted the notes and allowed the extensions. It would then become a question of fact as to whether such acts were approved and ratified by the home office. If this course of business was ratified by the company as to a given number of premium notes, it would then be a question of fact as to whether the company by its acts and conduct had authorized and empowered Rawlings as its agent to take and accept other premium notes and grant other extensions, as the plaintiff alleges, and as to whether the plaintiff was justified in dealing with the agent upon the assumption that he had such authority.

The recent case of *Sykes v. Sperow*, 91 Or. 568 (179 Pac. 488), after noting the hopeless conflict of authorities, makes this statement:

“Where the agent in question was the general agent of the company, created under the statute of the state as its only authorized agent, and being the only representative of the company within the state, we hold the better rule, and the one sustained by the weight of authority, to be that such a corporation cannot, by a general clause like the one in question, so limit the power of such general agent that he cannot waive a

provision like this, as to the mere method or manner of giving notice of the default of the subcontractor to the defendant company."

2 Joyce on Insurance (2 ed.), Section 439, lays down the rule that:

"Any agent with general or unlimited powers, clothed with an actual or apparent authorization, may either orally, or in writing, waive any written or printed condition in the policy, notwithstanding such restrictions."

Section 455 of the same volume says:

"Whenever a principal accepts the benefits of his agent's unauthorized acts with knowledge of all the material facts, he ratifies the same. Silent acquiescence with full knowledge of the material facts may amount to a ratification if continued for an unreasonable length of time, and third persons have acted in reliance upon and have been prejudiced by such acquiescence, especially where an agent, not a stranger, has exceeded his authority. In many cases a ratification will be inferred from the mere habits of dealing between the parties. Hence the policy of the company in dealing with its general agent in the matter of premiums had an important bearing upon the question at issue."

On the subject of ratification of an agent's acts by the principal, 1 Mechem on Agency (2 ed.), reads thus:

"Ratification may briefly be defined as the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him while purporting to act as his agent." (Section 347.)

"Ratification, moreover, differs from estoppel, though they are often very closely associated. Estoppel requires that the party alleging it shall have done something or omitted to do something, in reli-

ance upon the other party's conduct, by which he will now be prejudiced if the facts are shown to be different from those upon which he relied. Ratification requires no such change of condition or prejudice: if the principal ratifies, the other party may simply avail himself of it. As soon as ratification takes place, the act stands as an authorized one, and not merely as one whose effect the principal may be estopped to deny. If there be ratification, there is no occasion to resort to estoppel." (Section 349.)

"Ratification is an approval of a previous act or contract, which thereby becomes the act or contract of the person ratifying. It is not a *contract* to assume such liability. In the case of contracts, ratification is an affirmance of a contract already made, as it was made, and as of the date when it was made; and it is neither the making of a *new* contract to be bound by the *old* one, nor the making of a new contract in the terms of the old one." (Section 350.)

"The question seems to be this: From the failure to dissent under the circumstances, would the ordinary intelligent man be justified in inferring that the principal assented? Like other similar questions, this would be for the jury, unless reasonable men could fairly draw only one inference from the facts, and in that case the court may decide it." (Section 453.)

In *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158 (51 Am. Dec. 59), Mr. Chief Justice SHAW says:

"It seems to be now well settled * * since the great multiplication of corporations, extending to almost all the concerns of business, that trading corporations, whose dealings embrace all transactions from the largest to the minutest and affect almost every individual in the community, are affected like private persons with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and generally by those legal

and equitable considerations which affect the rights of natural persons."

From 31 Cyc. we quote the following:

"Ratification of the acts of an agent need not in most cases be express, but may be implied from the acts and conduct of the principal, and generally speaking a ratification may be implied from any acts or conduct on the part of the principal reasonably tending to show such an intention on the part of the principal to ratify the acts or transactions of the alleged agent, particularly where his conduct is inconsistent with any other intention, or where it appears that he has repeatedly recognized and approved similar acts done by the agent. * * Where an agency has been shown to exist the facts will be liberally construed in favor of the approval by the principal of the acts of the agent, and very slight circumstances and small matters will sometimes suffice to raise the presumption of ratification. Ratification is, however, a matter of intention, express or implied, on the part of the principal, and in order to establish an implied ratification there must be some acts or conduct upon his part which reasonably tend to show such intention. * * It is also the rule that as between the principal and third persons dealing with an agent less is required to constitute a ratification than is required between the principal and the agent." (Pages 1263-1266.)

"As a general rule the principal, upon learning of the unauthorized act of his agent, if he does not intend to be bound thereby, must within a reasonable time repudiate it." (Page 1275.)

"It is a well-settled rule, subject to certain exceptions, that a ratification relates back to the time when the unauthorized act was done and makes it as effective from that moment as though it had been originally authorized, and that therefore upon ratification the parties to all intents and purposes stand in the same position as though the person assuming to act as agent had acted under authority previously conferred." (Page 1283.)

In regard to premiums paid and accepted when past due, 14 R. C. L. says:

“To warrant a recovery where a premium is not paid when due, it is necessary to prove (1) the course of dealing between the insured and the insurer in reference to the acceptance of overdue payments amounting to a custom or habit; (2) that by reason of this course of dealing, the insured was justified in believing that the insurer would not insist on a forfeiture for failing to pay subsequent premiums; (3) that the insured believed he could postpone the payment of premiums without risking a forfeiture; and (4) that he acted on this belief, and therefore did not pay the premium at its maturity.” (Page 1184, Section 361.)

“The cases are numerous which hold that the acceptance of a premium after the time when it should have been paid is a waiver of the forfeiture which might have been enforced because it was not paid when due. This rule applies, according to the better opinion, where the premium is received after it is due by an agent without power to waive forfeitures and is afterwards received and retained by the insurer without inquiry.” (Page 1189, Section 367.)

“It is also a settled rule of law that where an insurer has knowledge of facts entitling it to treat a policy as no longer in force, and thereafter it receives a premium on the policy, it is estopped to take advantage of the forfeiture. It cannot treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums.” (Page 1190, Section 367.)

3. As the defendant admitted the payment of a large number of premiums in cash, and as the plaintiff testified that all of such payments were made to Rawlings, it then became a question of fact as to whether the plaintiff was justified in paying the disputed and undisputed premium notes to Rawlings as the defendant's general agent. The admitted facts, together

with all the other evidence and surrounding circumstances, were sufficient to take the case to the jury and there was no error in overruling the motion for a nonsuit and for a directed verdict.

4-11. Under exhaustive instructions the theory of the defendant was submitted to the jury, which was charged that—

If the company “did not hold out Rawlings to the public as possessing authority to collect premiums or renewals, or if the defendant did not know that Rawlings was collecting premiums, if he was collecting renewal premiums, or if by the exercise of ordinary prudence and caution could not have known, then the defendant would be entitled to a verdict at your hands. * * If Rawlings collected renewal premiums or extended the time of payment for renewal premiums and if the defendant received and collected such premiums with full knowledge of all the facts, then the defendant would be liable.”

If it found that Rawlings did collect renewal premiums and the defendant had no knowledge of irregularity and received the money in good faith from the Portland office, through its cashier there, the jury was instructed to return a verdict for the defendant. Other parts of the charge follow:

“If you find from the evidence that any premium on any of the policies covered by this suit was not paid when due and that the payment of such premium was not waived or extended by the defendant, then you are to find for the defendant on the particular policy on which the premium was not paid.

“If any renewal premiums were paid or extended by the execution of premium notes and any such note was not paid at maturity, or at the time to which they were extended, if they were extended, then the policy on which said note was given lapsed and the plaintiff cannot recover thereon.

"If at any time the insured failed to pay a premium when the same became due and within the time allowed by the terms of the policy, or if the insured failed to pay any premium note when the same became due, and there was no extension of time or waiver of the payment of either the premium or the note, then the policy upon which said premium or premium note would have applied, forthwith automatically lapsed without any further action on the part of the company. * *

"You are instructed that time is of the essence of an insurance contract, and if the insured fails to perform any condition on the date when it is due to be performed, then without any further notice or action by the company the policy lapses automatically and no leeway or days of grace are allowed the insured.

"In order to establish that an agent outside of the home office had authority to accept renewal premium payments on behalf of the company, the plaintiff must prove either that such agent was actually authorized by instructions or by his contract from the home office to make the collections of such renewal premiums, or that the defendant company represented and held out the agent as having the authority to collect renewal premiums, and also that the plaintiff in this case knew of and relied on the representations by the company as to the authority of the agent. No payment made to other than an authorized agent as defined by this instruction can be considered as a valid premium payment as against the company, unless the same was actually received by, consented to and ratified by the home office of the company.

"Any declaration or statement made by any agent of the company to the effect that such agent is authorized to collect premiums is of no effect and not binding upon the company.

"If Rawlings did not have actual express authority to collect renewal premiums, then payments made by Hinkson to Rawlings on renewal premiums are not valid as against the company, unless the company affirmatively held Rawlings out to Hinkson as having this authority, or unless the premiums were turned

over to, accepted and ratified by the company, and then official receipt issued, signed by an officer."

While the instruction as to the defendant's opportunity for knowledge is not sustained by the weight of authority, in view of all the other instructions which were given and the testimony in the record, we are of the opinion that it was not prejudicial and that the jury was not misled. On principle we are of the opinion that the instructions of the trial court last above quoted were correct.

12. The verdict was for the full amount of each alleged payment, with accrued interest. Upon the theory that the policies were in force until such time as they were canceled and that the plaintiff had the benefit of insurance, the defendant claims that it was entitled to a reduction or an offset. 2 Bacon on Benefit Societies and Life Insurance (3 ed.), Section 376, lays down this rule:

"If a company wrongfully declares the policy forfeited and refuses to accept the premium when duly tendered, and to give the insured the customary renewal receipt, evidencing the continued life of the policy, the assured has his choice of three courses: He may tender the premium and wait until the policy becomes payable by its terms and then try the question of forfeiture; or he may sue in equity to have the policy continued in force; or he may elect to consider the policy at an end and bring an action to recover the just value of the policy, in which case the measure of damages is the amount of the premiums paid with interest on each from the time it was made."

This is sustained by 4 Ann. Cas. 124 and 9 Ann. Cas. 666.

13, 14. The defendant assigns as error the refusal of the trial court to give a number of its requested instructions. In so far as they were correct they were

embodied in the charge given. The defendant contends that—

“The limitation of authority and the provisions relating to the payment of premiums are valid and constitute a part of the contract between plaintiff and defendant.”

That is the law and is sustained by the authorities which it cites. In legal effect the trial court so instructed the jury. But those authorities also lay down the rule that such limitations may be waived or modified by the company. We have examined the record with much care. The instructions were comprehensive and with the single exception noted were fair to the defendant.

The record presents a peculiar case. On December 8, 1909, the defendant issued to the plaintiff two life insurance policies of \$5,000 each, which the defendant admits remained in force until December 8, 1912. On December 30, 1911, it issued to the plaintiff another policy, for \$10,000, upon which the first premium was paid. It also admits that the plaintiff executed a number of extension premium notes in favor of it on such policies. Yet the fact remains that the first personal, direct communication from the home office to the plaintiff was on March 20, 1914, four years, three months and twelve days after the first policy was issued to him. On May 25, 1914, through a circular letter the defendant notified its policy-holders that it had “discontinued the collection of renewal premiums” through its Portland office and that Rawlings had no authority to collect, receive or accept annual renewal premiums. So far as the record shows, this was the first notice of that nature which ever issued from the home office of the company to its policy-holders.

There is ample evidence to sustain the verdict. The defendant's theory was fully and fairly submitted to the jury under proper instructions.

The judgment is affirmed.

AFFIRMED.

Motion to dismiss appeal denied September 10, 1918.

Argued on the merits, July 17, affirmed September 6, 1919.

MAYS v. ROBERT MAYS ESTATE CO.*

(174 Pac. 716; 183 Pac. 751.)

Appeal and Error—Sufficiency of Undertaking—Signature of Principal.

1. An appeal undertaking, reciting that plaintiff has appealed, and covenanting with defendant that in consideration thereof plaintiff will pay all damages, etc., awarded against him is sufficient, though not signed by plaintiff.

Appeal and Error—Undertaking—Recitals—Sufficiency.

2. An appeal undertaking, reciting that plaintiff has appealed and covenanting with defendant that in consideration thereof plaintiff will pay all damages, etc., awarded against him, is sufficient, though person signing does not describe herself as surety.

ON THE MERITS.

Mortgages—Presumption That Deed is Absolute may be Overcome in Equity.

3. The presumption is that a deed absolute upon its face is what it purports to be, and is intended as an absolute conveyance; but this presumption may be overcome in a proper case in a court of equity by evidence that the transaction was really a loan and that the deed was intended as a mortgage only.

[As to the effect of lapse of time to have deed declared mortgage, see note in *Ann Cas.* 1918C, 755.]

Mortgages—When Evidence Insufficient to Show Absolute Deed a Mortgage.

4. Evidence held insufficient to sustain claim that an absolute deed was intended as a mortgage to secure a loan from grantee to his brother, and that grantee agreed to convey property to brother on brother's repayment of loan.

*The question as to whether a deed absolute on its face but intended as a mortgage conveys legal title is discussed in a note in 11 L. R. A. (N. S.) 209.

From Lane: GEORGE F. SKIPWORTH, Judge.

On motion to dismiss appeal.

DENIED.

Mr. Charles A. Hardy, for the motion.

Mr. H. E. Slattery, contra.

McBRIDE, C. J.—1, 2. The respondent moves to dismiss this appeal for the alleged reason that the undertaking is insufficient. The undertaking is in the usual form, except that the surety therein does not describe herself as "surety," and the document is not signed by the principal.

We do not think the objection is well taken. In *O'Connor v. Towey*, 70 Or. 399 (140 Pac. 625), this court, speaking through Mr. Justice McNARY, held that it was not necessary for the principal to sign the undertaking. The undertaking recites the fact that the plaintiff has appealed from the decree, and covenants with the defendant that in consideration of such appeal the defendant will pay all damages, costs and disbursements which may be awarded against him on appeal. We are of the opinion this sufficiently indicates that the person signing the undertaking does so as surety for the plaintiff, and that the document is not subject to the objection urged.

The motion to dismiss is denied.

MOTION DENIED.

Affirmed September 16, 1919.

ON THE MERITS.

(183 Pac. 751.)

Department 2.

This is a suit brought by the plaintiff against the defendant, Robert Mays Estate Company, a corporation, to compel the defendant to deed over to the plaintiff a certain 80-acre tract of land situated in Lane County, Oregon. It seems that plaintiff was a younger brother of Robert Mays, deceased. In 1891 the plaintiff had contracted with one R. P. Allison for the purchase of the 80 acres of land in question, agreeing to pay therefor the sum of \$800. He went into possession of the land and paid the interest up to 1898, but seems to have been unable to make any payments on the principal. About that time Allison demanded the payment of the principal sum and plaintiff, being unable to pay it, appealed to his brother Robert, who then lived in Wasco County, Oregon. Here, there is a controversy between plaintiff and defendant; plaintiff contending that Mays agreed to loan him \$700, with which to complete the purchase of the land, and take the deed from Allison in Robert May's name to secure the payment of the money, which plaintiff claims he was to have without interest, and that he was to have a deed for the land from Robert Mays whenever he paid said sum of \$700.

On the contrary, the defendant claims that Robert Mays refused to make a loan to the plaintiff, but that he agreed to buy the land if it could be bought for \$700, and let plaintiff have the use of it for a home. At any rate, it is conceded that Robert Mays paid, or

advanced the \$700 and that the deed from Allison, with the consent of plaintiff, was made out to Robert Mays in absolute form; and that the deed was duly recorded in the deed records of Lane County. In 1902, about four years after the deed was executed, Robert Mays died, leaving a widow and heirs. Some years after his death the heirs formed a corporation, which is the defendant herein, and the land in question was conveyed by the heirs to said corporation, which has ever since been the holder of the legal title. After the purchase of the land in 1898 the plaintiff remained in possession of the property, using it as a home, until the death of Robert Mays, and thereafter continued to make it his home, with the consent of the heirs of Robert Mays, up to the year 1909, when plaintiff moved away from the land, and never lived upon it again; however, he continued to retain possession of the premises and rented the property to different parties, and finally, about 1913, leased it to one Hunnicutt for a period of eight years. The defendant refused to recognize the validity of these leases and about 1917, commenced a proceeding against Hunnicutt to recover possession of the property.

During the time plaintiff was in possession of the property, he made some moderate improvements on the place and paid the taxes up to the year 1913, and he had the use of the premises free of charge while he made it his home, and collected the rents and profits from the place after he moved away. The plaintiff brings this proceeding to have the deed made to Robert Mays declared a mortgage, and to compel the transfer of the land from the defendant to him. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. H. E. Slattery.*

For respondent there was a brief and an oral argument by *Mr. C. A. Hardy*.

BENNETT, J.—The only question in this case is purely one of fact, as to whether the transaction by which Robert Mays obtained an absolute deed to the land was an actual purchase by him, or whether it was in the nature of a loan, and the deed in the nature of a mortgage or security for the same. It is very plain that Robert Mays purchased the land with the primary purpose of providing a home for his brother; but Robert Mays is dead, and as there were no other witnesses to the transaction between Joel D. Mays and Robert Mays, and as the written communications between the two, at the time of the transaction, have been lost or destroyed in the intervening years, a conclusion must be reached almost wholly from the circumstances of the transaction, the presumption from the deed itself, the testimony of the plaintiff and his statements and admissions at different times.

3. The natural presumption in the first instance is that a deed absolute upon its face is what it purports to be, and is intended as an absolute conveyance, but this presumption may be overcome in a proper case in a court of equity, by evidence that the transaction was really a loan and that the deed was intended as a mortgage only. While the testimony of plaintiff in this case was that the transaction was a mortgage, we think his repeated admissions are inconsistent with that view, and destroy the effect of his testimony in that regard.

The defendant has introduced a series of letters from the plaintiff, written at different times, from which it appears he always recognized that the title in Robert Mays was an absolute title, and that the land

belonged to him and his heirs; and he seems to have made no claim otherwise until shortly before the commencement of this suit. The plaintiff acknowledges the writing and sending of the letters referred to. As early as 1892 he wrote to F. P. Mays, who seems to have been managing the Robert Mays estate, as follows:

"I want to know whether he ever had any understanding with any of you boys as to what disposition he wanted made of this place that *he bought*. I should have spoke to him and made some kind of a deal for the place when he was down if he had not started back so unexpectedly. Now Pierce I want you to let me know just what I can have the place for."

Again on May 11, 1909, he writes:

"I believe I have asked you twice by letter how much you would take for the place so I will ask you again to put a figure on the place, just what you will take right down."

On April 23, 1915, he writes:

"I never expected him to give us the place, but I did believe he would do just what he had told your Aunt Miley Hail and your Uncle Oliver Mays and Robertson Allison, the man he bought the place of, and they all told me that your father in talking with them, said he had made such provisions regarding the land that my family could have a home as long as we lived."

And again:

"Now Pierce, if you want to sell the place and want to do the right thing by us, as I requested you to do years ago, put a reasonable price on the place and give us the first dig at it."

Again in August of the same year (1915):

"So far as giving you possession, I will turn it over and you can place it on the market with the understanding that Hunnicutt has the use of the place until

the expiration of the fourth year, as he states in his letter."

On the 3d of October following, after the matter of the validity of the lease to Hunnicutt had come up and was discussed, he writes:

"I told him [Hunnicutt] I only claimed a life lease on the place. * * As to buying the place, I am not able. As to the reasonable cash value or cash sale, I will say \$40 per acre. I believe I can sell it for that. I am satisfied I could in a short time by putting an adv. in our county paper. I will try it if you say so for just what I get over \$40 per acre when you get ready to sell."

Finally on October 28, 1915, he writes:

"I aimed to tell you in my last correspondence that the taxes on *your eighty* in Lane County has not been paid this year, and I can't for my life raise the money to pay them. If they ain't paid at once the place will be advertised and sold. I will send you the statement I received from the sheriff not long ago so you can send the amount necessary to settle them and get your receipt."

4. These statements and admissions are absolutely and fatally inconsistent with the present claim of the plaintiff, that he owns the property and that the transaction was only a loan and mortgage. In view of these statements and admissions and of the absolute character of the deed upon its face, it seems plain that the plaintiff has not sustained the allegations of his complaint.

The court below evidently came to this conclusion, after hearing the plaintiff's testimony and all the oral testimony in the cause. We find nothing in the record upon which this finding and conclusion can be disturbed.

AFFIRMED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued July 17, affirmed September 16, 1919.

McPHERSON v. BARBOUR.*

(183 Pac. 752.)

Escrows—Vendors' Deposit of Deed in Bank—Compliance with Contract.

1. Deposit, by the vendors of a tract, in a specified bank, of deeds conveying lots to buyers of such lots from the vendees of the tract, held a full compliance by the vendors with their agreement to place such deeds in escrow in the bank, an "escrow" being an instrument importing obligation deposited with a stranger or third party, to be held until the performance of a condition, and then delivered, though the time given to some of the lot purchasers to pay extended the time beyond the contractual four-year period of payment for the whole tract.

[As to delivery in escrow, see note in 53 *Am. St. Rep.* 555.]

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2.

This is a suit in equity brought by P. M. McPherson and Mary Ann McPherson, to foreclose a land sale contract, entered into May 1, 1913, between them and A. C. Barbour, T. Rosalynd Barbour, M. M. Peery, and E. E. Kepner. Upon the death of P. M. McPherson, Seth M. McPherson and Walter McPherson, administrators of his estate, were substituted as plaintiffs instead of P. M. McPherson. Reference will be made hereafter to plaintiffs without noting such substitution. A decree was rendered in favor of plaintiffs, and against the above-named contractees, and the latter appeal.

The complaint is in the usual form in such suits, setting out the contract and alleging that the vendees had made default in the matter of payments called for by

*For authorities discussing the question of necessity of strict compliance with conditions of escrow agreement, see note in *L. R. A.* 1916A, 502.

On proof of escrow agreement by parol, see note in 18 *L. R. A.* (N. S.) 337. REPORTER.

the contract. The agreement entered into between the parties was in effect that the plaintiffs agreed to convey to the appellants certain real property described in the contract. The purchase price of the property is mentioned as \$30,698, \$10,198 of which was paid at the time of the execution of the contract and the balance, \$20,500, was to be paid on or before four years after date of the contract with interest at 6 per cent per annum, payable January 1, 1914, and annually thereafter. Five hundred dollars or more could be paid on the principal at any time, and the same was to be applied when full payment was made on the purchase price of the tract. Certain reservations were made in regard to the growing crops on the land, the details of which are not material here. The contract contained the following stipulation:

“It is further agreed that second parties may have said lands or any part thereof, surveyed and platted into blocks and lots as they shall elect, and first parties hereby agree and contract to execute, acknowledge and deliver without charge, but at the expense for platting, surveying, notaries’ fees, and filing of second parties, any and all deeds of dedication thereof required or requested by second parties.

“It is further agreed that second parties may sell any part of said premises and lots or blocks therein, subject to the above reservations, at a price of not less than 150% *pro rata* of the above mentioned purchase price, and upon payment to first parties of 90% of such sale price, in addition to the payments herein acknowledged, first parties shall at the expense of second parties make and execute deeds for such lots or tracts so sold; also that for lots or tracts sold by second parties upon time, first parties shall at the request of second parties make and execute good and sufficient deeds therefor, which deeds shall be placed in escrow in the First National Bank of Springfield, Oregon, to

be delivered to the purchaser upon full payment therefor. Ninety per cent of the purchase price for lots or tracts sold, including those sold for cash and those sold wholly or partially on time, shall be paid into said First National Bank, and by it held in a separate account to the sum of Five Hundred Dollars, and whenever such proceeds shall amount to the sum of Five Hundred Dollars or more, the same shall be, by said bank, paid over to said first parties and credit shall be given on this contract therefor."

The purchasers agreed to pay the taxes assessed against the premises on the 1913 and all subsequent tax-rolls. The vendors in case all of said payments with interest and taxes should be fully paid as specified in the contract agreed to execute and deliver to the vendees, their heirs or assigns, a good and sufficient deed in fee simple of the premises, or such portion thereof as shall not have been theretofore deeded. The contract further provided as follows:

"And it is agreed that if the said parties of the second part shall fail to make any of said payments at the time and in the manner above specified, or within sixty days after any payment of principal or interest shall become due, or shall fail to pay any tax or assessment before the same shall become delinquent; this agreement shall be henceforth void, all payments thereon forfeited, and possession of said premises shall be at once surrendered to the first parties, or said first parties may elect to declare the whole of said purchase price due and proceed at once, by foreclosure or otherwise, to gain possession of said premises."

The contract of sale was executed in triplicate; one of which was retained by the plaintiffs; one by the appellants, and one was left with the officers of the First National Bank of Springfield. After making the contract the purchasers proceeded to plat and sub-

divide said tract into lots and blocks making a total of 365 lots and duly recorded the plat, the McPhersons assisting therein, making the necessary dedication of the streets and alleys provided for in the plat.

The appellants by their answer, after admitting the making of the contract, alleged that the vendors breached the contract by refusing to comply with the terms and conditions of the same, and—

“Absolutely refused to enter into any escrow agreements with purchasers procured by these defendants, or to make, execute, acknowledge and deliver in escrow in the First National Bank of Springfield, or elsewhere, deeds of conveyance from them to the said purchasers, as provided in said contract, or otherwise, and absolutely refused and neglected to part with dominion and control over such deeds and deposit the same in the First National Bank of Springfield, Oregon, in escrow, as provided in said contract, or in any other manner so as to protect the purchaser, so that such purchaser could procure deeds by payment of the purchase price in installments and on time, as the plaintiffs had agreed and covenanted to do under the terms of their contract.”

That by reason thereof, it was impossible for the vendees to sell lots or tracts of land to prospective purchasers.

AFFIRMED.

For appellants there was a brief with oral arguments by *Mr. Q. H. Foster* and *Mr. Chas. A. Hardy*.

For respondents there was a brief over the names of *Mr. Lark Bilyeu*, *Mr. A. C. Woodcock* and *Mr. Frank Depue*, with oral arguments by *Mr. Bilyeu* and *Mr. Woodcock*.

BEAN, J.—1. It appears from the record that after the land was platted, the original vendees negotiated

sales of some of the lots to different parties. In regard to the lots that were sold on the installment plan, or on time, the appellants usually collected 10 per cent of the amount of the purchase price for such lots, and would prepare a deed for the same from P. M. McPherson and wife to the purchaser of the respective lot, stating the consideration to be paid and left the same at the First National Bank of Springfield, Oregon, for plaintiff and wife to execute; that upon notice thereof, either by one of the appellants or an officer of the bank, McPherson and wife duly executed and acknowledged such deed, and deposited the same in the First National Bank of Springfield as a fulfillment of the contract. The officer of the bank noted on the back of the original contract left with it as follows:

“No payments in amount less than \$500 to be indorsed hereon. Place credits in smaller amounts in McPherson escrow acct.”

The bank proceeded to keep an account of the payments made for lots sold by the appellants and deposited in the bank until such time as the same should amount to \$500. After the sale of a few lots had been made by appellants, they prepared and had printed blanks for a so-called escrow agreement to the effect that the deed to the particular lot sold shall be held in escrow at the First National Bank of Springfield until the price of the lot with interest has been paid, and directing the bank to deliver the deed to the grantee when such payment is made; that upon failure to make payment the deed to be recalled and the amounts paid forfeited. After that when they sold a lot they obtained the signature of the purchaser of the same to the escrow agreement, properly filled out and inserted the name of P. M. McPherson therein, and left the same at the bank, and requested Mr. McPherson to

sign the agreement. This he failed to do as he states that he had already signed a contract for the sale of the land and the same was unnecessary; that it would complicate the matter. It is not contended by the appellants that the McPhersons failed to execute the deeds as requested, but that they failed to execute the escrow agreement which the vendees desired. This they contend was a breach of the contract. It appears from the testimony that after some consultation between the parties in regard to the matter, Mr. McPherson indicated that he would sign the escrow agreement if the appellants would indorse on the contract the following, a form of which was furnished them by McPherson:

“For a valuable consideration, it is hereby mutually agreed by and between the parties to this contract, that the time for the completion and payment of the within contract, except as to the payment of the interest, be and the same is hereby extended two years and three months from the date of this contract, to correspond with the time of sale.”

The proposed stipulation was never indorsed on the land sale contract involved herein, but one of similar purport bearing the date of sale made was indorsed on the so-called escrow agreements and signed on behalf of appellants, leaving a blank for Mr. McPherson to sign when they were left in the bank. McPherson never signed any of the indorsements or any of the so-called escrow agreements. The bank received the different deeds executed by P. M. McPherson and his wife to the different purchasers together with the incomplete escrow agreement and placed the same in an envelope. A sample of the indorsements made on the envelopes at the bank is as follows:

“Central Land Co.—A. L. Johnson.
Escrow No. 747. Consideration \$——.
From Central Land Co.,
Party of the First Part,
To A. L. Johnson,
Party of the Second Part.
Credit payts. to acct. McPherson Escrow #521.”

It seems the appellants made sales of lots in the name of Central Land Company. The sole question raised in this case is: Did McPherson fail to comply with the contract of sale, or was the execution of the different deeds of lots to purchasers and the placing the same in the bank to be delivered by it to the respective purchasers upon full payment of the purchase price, a full compliance with his contract?

It should be borne in mind that it was stipulated between the parties to the contract that when the second parties, the appellants, should sell a lot or tract on time according to the stipulations of the contract the first parties “shall at the request of second parties make and execute good and sufficient deeds therefor.” This it is conceded was done. It was further stipulated thus:

“Which deeds shall be placed in escrow in the First National Bank of Springfield, Oregon, to be delivered to the purchaser upon full payment therefor.”

The definition of an “escrow” is given as follows:

“An escrow is a written instrument which by its terms imports a legal obligation, and which is deposited by the grantor, promisor, or obligor, or his agent, with a stranger or third party, to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee, or obligee”: 10 R. C. L., § 2, p. 621.

See, also, 11 Am. & Eng. Ency. of Law (2 ed.), p. 333 et seq.; *Davis v. Brigham*, 56 Or. 41 (107 Pac. 961, Ann. Cas. 1912B, 1346); *Tyler v. Kate*, 29 Or. 515 (45 Pac. 800). Delivery as an escrow is defined as a delivery on some collateral condition which must be consistent with the contract, on the happening of which condition alone the contract is to take effect. No precise form of words is necessary to constitute an escrow. The term "escrow" need not be used, nor will the misuse of that term in designating an instrument necessarily make it an escrow. There can be no escrow unless the delivery of the instrument by the depository to the grantee or obligee is conditioned upon the performance of some act, or the happening of some event. The condition upon which an instrument is delivered in escrow need not, however, be expressed in writing, but may rest in parol, or be partly in writing and in part oral: 10 R. C. L., § 5, p. 623. Citing *Couch v. Meeker*, 2 Conn. 302 (7 Am. Dec. 274); *Taft v. Taft*, 59 Mich. 185 (26 N. W. 426, 60 Am. Rep. 291); *Manning v. Foster*, 49 Wash. 541 (96 Pac. 233, 126 Am. St. Rep. 876, 16 Ann. Cas. 95, 18 L. R. A. (N. S.) 331, and note); *Bowker v. Burdekin*, 11 Mees. & W. 128 (12 L. J. Exch. 329, 8 E. R. C. 598); notes, 130 Am. St. Rep. 913, 950, 10 L. R. A. 470); *Fulton v. Priddy*, 123 Mich. 298 (82 N. W. 65, 81 Am. St. Rep. 201); *Campbell v. Thomas*, 42 Wis. 437 (24 Am. Rep. 427; note, 1 Am. St. Rep. 114).

To constitute an escrow it is essential, not only that the grantor and grantee are at one as to the conditions under which the deposit is to be made, but that such conditions should be communicated to the depository. And it is equally essential that the grantee or obligee is aware of every circumstance in connection with the conditions likely in any way to affect the liability

under it: Note, 130 Am. St. Rep. 933. Where the possession of the depositary is subject to the control of the depositor, an instrument cannot be said to be delivered, and it is not an escrow. While the depositor's right of possession may return if the specified event does not happen, or the conditions imposed are not performed, yet to constitute an instrument an escrow it is essential that the deposit of it should be in the meantime irrevocable; that is, that when the instrument is placed in the hands of the depositary, it should be intended to pass beyond the control of the depositor, and that he should actually part with all present or temporary right of possession and control over it. In case the deposit is made in furtherance of a contract between the parties, the contract must be so nearly complete that it remains only for the grantee or obligee or another person to perform the required condition, or for the event to happen, to have the instrument take effect according to its import: 10 R. C. L., § 8, p. 626.

It appears from the contract above quoted that the conditions upon which the deeds to lots that might be sold by the appellants should be deposited in the First National Bank of Springfield were all contained in that contract for the direction of the parties, except the price to be paid for each of the various lots. Such price in every case disclosed by the record was mentioned in the deed which was deposited in the bank. It appears that the depositary was fully informed as to the conditions, one of the triplicate contracts being left with the bank for its guidance in the matter.

We therefore conclude that the deposit of the several deeds which the McPhersons were requested to execute and which they executed and deposited in the bank under the circumstances detailed in this case was a full compliance on their part, to place such deeds in

escrow in the bank; that they did not fail to comply with the contract in this respect; that all the conditions upon which the deeds were delivered in escrow by McPherson did not necessarily have to be expressed in writing. He was not required to use the word "escrow" when he deposited the deeds in the bank. The deeds were complete in every respect, and were deposited with the bank pursuant to the sale contract. The vendors thereby relinquished all dominion over them. The condition of delivery to the grantee named therein was specified and understood by the depository. In so far as shown by the record, such arrangement was understood by, and satisfactory to, the different lot purchasers. The contract provided that the vendees, A. C. Barbour et al., should sell the lots after the tract was platted, and not the McPhersons. That instrument authorized the vendees to make such sales. It was not absolutely necessary for McPherson and wife to sign additional agreements.

Something is said in the argument in regard to the time given to some of the lot purchasers to pay for the lots, thereby extending the time beyond the period of four years for the full payment for the tract according to the terms of the contract of sale involved herein. But it appears that Mr. McPherson was willing that the time for payment for such contract should be extended. This is shown by the indorsement which he proposed to have indorsed on the contract, so there is no real controversy between the parties in regard to the time allowed the different lot purchasers. The plaintiffs by the execution of the deeds with knowledge of the time of payment sanctioned such agreement, and this matter need not be further considered. It is admitted that the appellants were in default in their payments; they had sold and apparently could sell

only comparatively a few lots. While there may have been some misunderstanding as to the rights and duties of the parties to the contract of sale, the claim of the appellants savors of an attempt to place the vendors in default in order to obtain a return of the partial payments they had made for the real property. Five persons who purchased lots of appellants upon the installment plan and had each only partially paid for the lots so purchased were made defendants in this suit. The decree of the trial court allowed such defendants to complete the payments for their respective lots and receive their deeds therefor. No appeal was taken from that part of the decree. Provision was also made for the appellants to complete payment for the real property within one year from the date of the decree.

After a careful examination and consideration of the record, and the question submitted, we affirm the decree of the lower court.

AFFIRMED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued June 27, affirmed September 16, 1919.

RALSTON v. BENNETT, SUPERINTENDENT OF BANKS.

(183 Pac. 766.)

Judgment—Erroneous Decree of Supreme Court cannot be Set Aside by Suit to Vacate.

1. An erroneous decree of the Supreme Court cannot be set aside, merely because erroneous, by an original suit, where the court had jurisdiction of the parties and of the cause.

[As to perpetuation of legal error, see note in 73 Am. St. Rep. 101.]

Courts—"Jurisdiction" Defined.

2. "Jurisdiction" is the power to hear and decide.

From Multnomah: ROBERT G. MORROW, Judge.

In Banc.

This is a suit in the nature of a bill of review to impeach and set aside a previous decree against the plaintiff herein and in favor of the defendant Sargent, as superintendent of banks, wherein it was decreed that the said superintendent of banks should recover from the plaintiff herein the sum of twenty-four thousand two hundred (\$24,200) dollars, and his costs and disbursements, etc.

The original suit was brought by the defendant Sargent against the plaintiff Ralston, to recover upon his liability for 245 shares of the capital stock of the American Bank & Trust Company of Portland. It was alleged in substance that the corporation was insolvent and was in the hands of Sargent, the plaintiff, as superintendent of banks, and that said corporation had issued the shares in question to Ralston; that defendant Ralston, in payment of the same, agreed to transfer certain real property in the City of Portland, which it is alleged, he represented to be of the value of \$22,200, and to which, according to the allegations of the complaint, he represented that he had a good merchantable title, which he would transfer by warranty deed to said corporation.

It is further alleged that these representations were false, and as a matter of fact that he had at the time only a tax title to the land in question, of practically no value; that he never has executed the warranty deed which he agreed to execute, and that thereafter, said Ralston caused the manager and cashier of the corporation to execute in his favor an unauthorized

release, against all claims due from him to the corporation.

This suit finally went to trial in the Circuit Court for Multnomah County and was decided in favor of the plaintiff and against the defendant, who is now plaintiff herein. Ralston, plaintiff herein, appealed to the Supreme Court. The case, being a suit in equity, was tried *de novo* and a decree, which is sought to be set aside herein, was adjudged by this court, and afterwards by order and mandate of this court, was entered in the Circuit Court for Multnomah County.

Thereafter, another suit brought by the bank examiner against Waterbury and other subscribers to the stock of the corporation, was decided by the Circuit Court of Multnomah County, and in its turn came up on appeal to this court. It was here heard before Department No. 1, and it was held that the complaint in that cause was insufficient to support a decree or state a cause of suit, because it did not allege that the defendants were stockholders of the corporation at the time of the commencement of the suit. The court in the latter case distinguished between that case and the *Ralston Case*, 80 Or. 16 (154 Pac. 759, 156 Pac. 416), upon the grounds that the latter, which may be referred to as the Waterbury case, was in the nature of a winding-up suit against the original subscribers upon their unpaid liability; while the suit in the Ralston case was of a different nature, being brought against Ralston individually to recover the purchase price which he had agreed to pay, and actually attempted to pay, by the fraudulent transfer of the alleged worthless title to the Portland property.

After the Waterbury case was decided, the plaintiff herein brought this suit to set aside the decree in his case, claiming that the decision in the Waterbury case

was inconsistent with that in his own case, and that under the law, as stated in the latter case, the complaint in his case, did not state facts sufficient to constitute a cause of suit.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Charles A. Johns* and *Messrs. Fulton & Bowerman*, with an oral argument by *Mr. Jay Bowerman*.

For respondents there was a brief and an oral argument by *Mr. Sidney J. Graham*.

BENNETT, J.—1. As we view it, it is entirely unnecessary to inquire as to whether or not the decision in the Waterbury case and the principles of law there announced are inconsistent with the decision in the Ralston case sought to be set aside herein. It seems to be entirely settled, that however erroneous a decree of the Supreme Court may be, it cannot be set aside, upon the ground of such errors alone, by an original suit if the court had jurisdiction of the party and the cause.

In the work of *Mr. Freeman on Judgments*, it is said:

“A court of equity will not lend its aid unless the party claiming its assistance can impeach the judgment by facts or on grounds of which he could not have availed himself at law, or was prevented from doing it by fraud or accident or the act of the opposite party, unmixed with negligence or fraud on his own part. When a party has once an opportunity of being heard, and neglects to do so, he must abide the consequences of his neglect. A court of equity cannot relieve him, though the judgment is manifestly wrong”: Vol. 2 (2 ed.), § 486.

Mr. Black states the rule thus:

"The doctrine is fully established that a court of equity will not, on the application of the defendant in a judgment at law, who has had a fair opportunity to be heard upon a defense over which the court pronouncing the judgment had full jurisdiction, set aside the judgment or enjoin its enforcement, simply on the ground that it was unjust, irregular or erroneous": Black on Judgments (2 ed.), § 367.

It is true the learned writers referred to had particularly in mind suits to set aside judgments in actions at law rather than decrees in an equity suit; but it is obvious the same principles apply to both.

In *Washington Bridge Co. v. Stewart*, 3 How. 413, 425 (11 L. Ed. 658, see, also, Rose's U. S. Notes), the Supreme Court of the United States by Mr. Justice WAYNE, says:

"The Supreme Court has no power to review its decisions, whether in a case at law or in equity. A final decree in Chancery is as conclusive as a judgment at law. * * Both are conclusive as to the rights of the parties thereby adjudicated."

2. There is no claim that the court did not have jurisdiction of the parties in this case, and it seems clear that the subject matter also was within the jurisdiction of the court. Jurisdiction is defined as "the power to hear and decide," and there is no room for question that this court in the original Ralston case, had power to hear and decide as to whether or not the complaint in that case was sufficient to state a cause of suit.

In *Brown on Jurisdiction of Courts* (2 ed.), Section 2, page 7, it is said:

"If there be a petition that is subject to be assailed by demurrer, if so attacked, and the court having its power called in question, or rather in action, decides that the petition is sufficient, even although in law it

is insufficient, still the court is exercising jurisdiction; and, although the decision and finding of the court is clearly erroneous, it nevertheless is exercising its judicial power, and its failure to correctly decide on the question of the sufficiency of the petition does not deprive it of jurisdiction; its decision is simply erroneous."

This seems to be the principle uniformly declared by the authorities.

It may seem plausible at first glance that a court should always correct its own errors, whenever called to its attention, but when we remember that such a doctrine would lead to repeated and unending litigation, in which the rights of the parties would never be finally determined, such a rule becomes at once impracticable and impossible. There would seldom be a case in which the losing party would not believe the court had declared the law erroneously, and no number of decisions would be likely to disabuse a disappointed litigant of such a belief.

In this case, if Ralston has a right to bring an original suit to set aside the decision in his case, upon the ground of error, the superintendent of banks would have the right to bring a like suit against the winning defendants in the Waterbury case, and relitigate the questions involved therein. Indeed, in this very case, if the court had such jurisdiction, and should attempt to review the previous decision, in whichever way we might decide it, the losing party would be at liberty to come into court again for a third time, on the claim that we had erred, or were mistaken in our decree; and so the processes of litigation would go on interminably, and would never reach a final and ultimate decision. As long as there are courts and human tribunals mistakes and errors will sometimes occur; but it

is better that such occasional errors shall stand, than that all litigation should be left unending and interminable.

It must not be supposed that we are assuming in any way that the Ralston case was not properly decided, or that the distinction between that case and the Waterbury case was not sound and well taken. We are simply refusing to relitigate these cases or to inquire further as to whether the principles announced therein were just and correct, when the causes have been once finally decided upon appeal. **AFFIRMED.**

Judge JOHNS takes no part in the consideration of this case.

Submitted on brief September 2, affirmed September 23, 1919.

KILLINGSWORTH v. PORTLAND.*

(184 Pac. 248.)

Municipal Corporations—Questions of Law and Fact not Reviewable on Writ of Review.

1. In writ of review proceeding to set aside street improvement proceedings and assessment of the expense thereof, the court will not consider question whether the street improved was a part of a bridge approach; such question being a question of fact, or mixed law and fact, not reviewable under writ of review.

Municipal Corporations—City Council's Determination as to Benefits from Improvement Conclusive.

2. In writ of review proceedings to set aside street improvement proceedings, court will not review question of whether property assessed was actually benefited, or whether apportionment of cost made by assessment was just or fair; the city council's determination as to benefits being conclusive.

Municipal Corporations—Viaduct may be Constructed as Part of Street Improvement.

3. Amended Portland City Charter of 1913, Section 190, subdivisions 1-4, providing in subdivision 4, that council "shall" levy tax for

*On necessity of special benefits to sustain assessment for local improvements, see note in 14 L. E. A. 756. **REPORTER.**

construction of bridge to cost more than \$15,000, does not preclude council from providing for construction of viaduct, as part of street, at cost of more than \$15,000, by assessment under old charter Sections 373 and 374, incorporated into amended charter by Section 284 of amended charter.

[As to betterments on public lands, see note in 81 Am. St. Rep. 188.]

Statutes—Implied Repeal not Favored.

4. Implied repeals are not favored.

From Multnomah: JOHN P. KAVANAUGH, Judge.

In Banc.

The purpose of this proceeding is to set aside by writ of review certain proceedings of the City of Portland, whereby the city authorized and entered upon the improvement of Union Avenue in said city, from the south line of Bryant Street to the south line of Columbia Slough Road; and assessed the cost of the same to the property in the vicinity of said street and supposed to be benefited thereby. A very large part of the improvement consists in the building of a viaduct over the railroad track of the Oregon-Washington R. R. & Navigation Co., where said track intersects said Union Avenue.

It is claimed by the plaintiffs and petitioners for the writ of review that the improvement is for the benefit of the general public and of small if any benefit to the abutting owners; that the assessments are out of proportion to the benefits conferred upon the different pieces of property, and that a part of the property assessed is not benefited at all, but rather damaged by the improvements. It is also claimed that the street in question is an approach to the interstate bridge across the Columbia River, which forms a link in the Pacific Highway, and that, therefore, the improvement should be considered as a part of said bridge.

Further, it is claimed that by reason of an amendment to the city charter, providing that the city shall levy taxes not to exceed one-half mill on each dollar, to provide for the construction of bridges and the filling of streets across gulches and ravines, the power, which it is conceded the city previously had, to assess the costs upon the property benefited, is taken away and destroyed and, therefore, as a matter of law, the city council was without any jurisdiction to make this assessment, and the proceedings against the property of the petitioners are without jurisdiction and void.

AFFIRMED.

For appellants there was a brief submitted over the names of *Messrs. Malarkey, Seabrook & Dibble* and *Mr. M. A. Zollinger*.

For respondents there was a brief prepared by *Mr. Walter P. La Roche*, City Attorney, and *Mr. L. E. Lartourette*, Deputy City Attorney.

BENNETT, J.—1. It seems clear that in this review proceeding we cannot inquire into the question of whether or not the street improved was a part of the approach to the Columbia River bridge. That is a question of fact, or mixed law and fact, which cannot be tried out upon a writ of review. In *Smith v. Portland*, 25 Or. 297, 301 (35 Pac. 665), it is said:

“The authorities * * fully sustain the position that the writ of review only brings up the record of the inferior court, and that the Superior Court, upon review, tries the cause only by the record, and only as to questions of jurisdiction, and as to error in proceedings. It will not on review try questions of fact.”

And again:

"If courts will not examine the evidence when in the record, they certainly will not examine it when, as in this case, it is no part thereof."

In *Elmore Packing Co. v. Tillamook County*, 55 Or. 218, 223 (105 Pac. 898), it is said:

"A recital in the petition of independent facts cannot aid the record sought to be reviewed. It must show the facts presented by the record from which the error appears."

And in *McCabe-Duprey Tanning Co. v. Eubanks*, 57 Or. 44, 49 (110 Pac. 395, 396), it is said:

"The writ of review only lies to review the action of the lower court, when it has exceeded its jurisdiction or has exercised its functions erroneously; that is, in a manner not authorized by law. * * Error of the court in passing upon the sufficiency of the pleadings is not an erroneous exercise of jurisdiction. Even if error was committed, it was done in the rightful exercise of jurisdiction, and is not reviewable in this proceeding."

In this case it does not appear from the record brought up by the writ, that the street in question, or the part of the street improved, was a mere approach to the bridge in any immediate sense. Indeed, it seems to be conceded that it was two miles or more away from the bridge. And as far as the record brought up here by the city council shows, it was only an approach to the bridge in the same sense that any street or highway leading to the bridge, would be an approach. At any rate, that is a question of fact which we cannot inquire into in this proceeding, and we have no definite and certain means of arriving at the truth in regard thereto.

2. Neither can we, in this proceeding, inquire as to whether the property assessed was actually benefited

or as to whether the apportionment of the cost made by the assessment was just or fair. In *King v. City of Portland*, 38 Or. 402, 429 (63 Pac. 2, 55 L. R. A. 812), which is a leading case in this state upon this subject, and in which the question was carefully and elaborately considered by Mr. Justice WOLVERTON, it is said:

"But we are inclined to believe that the better doctrine deducible from adjudged cases, including those of the Supreme Court of the United States, is that the assessment will be upheld wherever it is not patent and obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, the cost and relative value of the property to the assessment, that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the district as between owners."

In *Hughes v. Portland*, 53 Or. 370, 394 (100 Pac. 942, 951), it is said by Mr. Justice R. S. BEAN, delivering the opinion of the court:

"The extent to which the property is benefited and the proportionate share of the cost of the improvement which shall be charged against it, is left to the judgment of the council, and, when it has exercised its judgment, its decision—in the absence of fraud or demonstrable mistake of fact—is conclusive, except as a right of appeal may be given by the charter."

And in *Wagoner v. La Grande*, 89 Or. 192, 202 (173 Pac. 305, 308), it is said by Mr. Justice McCAMANT, quoting from *Page & Jones on Taxation*:

"The question of benefit to the property owner is not a judicial question unless the court can plainly see that no benefit can exist and this absence of benefit is so clear as to admit of no dispute or controversy by evidence."

And further:

"Plaintiffs contend that the council erred in fixing the district to which the expense should be chargeable. This determination is a legislative act which the court cannot review."

These authorities seem to be conclusive in this state and they are in line with the general authorities.

Cooley on Taxation, Volume 2, 1180, presents the matter thus:

"With the wisdom or unwisdom of special assessments, when ordered in cases in which they are admissible at all, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion."

It is perfectly plain here that it is not apparent, and this court is in no position to say, that the property in question was not benefited by this improvement, or to pass intelligently upon whether the improvement was a benefit or not, or if so to what extent. Therefore, if the city council had authority to act in this matter at all and to make an assessment of this kind thereon, then its action is beyond the power of this court to review in this proceeding.

The most serious and difficult question in the case arises on the construction of the provisions of the amended charter authorizing and enjoining the levy of a general tax, to make improvements of the class, to which viaducts like the one forming part of this improvement, belongs. In deciding this question it will be necessary to trace somewhat the history of the authority for street improvements in the City of Portland.

In 1903 (Sp. Laws 1903, Chap. 1, Art. IV), the state legislature granted to the City of Portland, a charter

among the provisions of which, in regard to local improvements, were the following:

"Section 373. The term 'improve' and 'improvement,' as used in this chapter in reference to streets shall be construed to include all grading or regrading, paving or repaving, planking or replanking, macadamizing or remacadamizing, graveling or regaveling, and all manner of bridge-work and roadway improvement or repair and all manner of constructing sidewalks, crosswalks, gutters and curbs within any of the streets in the City of Portland, or any part of any such street.

"Section 374. The Council, whenever it may deem it expedient, is hereby authorized and empowered to order the whole or any part of the streets of the City to be improved, to determine the character, kind and extent of such improvement, to levy and collect an assessment upon all lots and parcels of land specially benefited by such improvements, to defray the whole or any portion of the cost and expense thereof and to determine what lands are specially benefited by such improvement and the amount to which each parcel or tract of land is benefited."

Section 284 of the amended charter adopted in 1913 continues the sections of the old charter, in regard to public improvements heretofore quoted, as ordinances except as the same may be inconsistent with other provisions of the new charter, that section being as follows:

"Section 284. That so much of Sections 362 to 421, both inclusive, of the Charter of 1903, as is not inconsistent with the provisions of this Charter, shall remain in full force and effect as ordinances only subject to repeal and amendment and to the enactment of new legislation by the council in the manner and subject to the restrictions in this section provided upon the subject of improvements of whatever nature to be paid for by local assessment. Such Sections shall be known as the Local Improvement Code. No repeal of any por-

tion thereof, amendment thereto nor new legislation upon the subject shall be made by the Council except by ordinance which shall be published in full and in its final form in the City official newspaper at least thirty days before its final passage. Notice shall be given in the City official newspaper and by publishing conspicuous advertisements in one or more daily papers published in the city of Portland, having a circulation of not less than 1500 not less than five times; the last of such notices to be published not less than ten days before the final adoption of any such amendment, repeal or new legislation. Upon the adoption of any amendment to or the repeal of any part of such Local Improvement Code or the adoption of any new legislation upon the subject, the whole Local Improvement Code shall be printed in pamphlet form and the Auditor shall be furnished with a sufficient number of copies thereof for distribution to all persons inquiring for the same. The Council, in the exercise of its general legislative powers, may provide in its discretion for the performance of any public work by or on behalf of the City and for the method of payment thereof, but said Local Improvement Code must provide for the giving of not less than ten days' notice by publication, or by mailing to persons interested, (a) of the intention to make any improvement, and (b) of any proposed assessment against property owners for the same, and the right shall be preserved to the owners of sixty per centum in extent of the property affected by any assessment for a local improvement, except for street opening or sewers to defeat the same by remonstrance."

Section 190 of the new charter is as follows:

"The Council, on or before the 31st day of December in each year shall levy upon all property not exempt from taxation, taxes to provide for the payment of expenses of the City for the ensuing year as follows:

"1. A tax not to exceed 8 mills on each dollar valuation to provide for the payment of the general ex-

penses of the City, including maintenance and repair of sewers and paved streets, except as hereinafter in this Section provided, which shall be credited to the General Fund.

"2. A tax sufficient to meet the interest on the bonded indebtedness of the City, to be credited to the bonded indebtedness interest fund.

"3. A tax of not less than four-tenths of one mill on each dollar valuation for the purchase, payment or redemption of the bonded indebtedness of the City, to be credited to the sinking fund.

"4. A tax not to exceed one-half mill on each dollar valuation to provide for the construction of bridges elsewhere than across the Willamette River, the filling of streets across gulches and ravines, the estimated cost of bridges, not to be less than \$15,000 and the fills \$20,000; and the construction of overhead or underground crossings across railroad tracks; provided that this section shall not release any company or corporation having a franchise or otherwise liable, from paying its full share of the cost of construction of bridges, fills or crossings as provided by the terms of its franchise or otherwise existing."

It is contended by the plaintiffs and petitioners that subdivision 4 of the section just quoted is inconsistent with the provisions of the old improvement sections, which authorized the assessment of abutting property for bridge work and viaducts, where such bridge work is to cost in excess of \$15,000—in other words, that the provision that the council "shall" levy a tax not to exceed one-half mill to provide for the construction of bridges, the estimated cost of which is greater than \$15,000, is mandatory not only in the sense that it enjoins and commands the levy of a tax, for that purpose, but also in the sense that it prohibits the building of such bridges and fills in any other way; and that it impliedly repealed that part of the sections carried over into the new improvement Code by Section 284,

which authorized the building of such bridges in any case, by assessment.

3. We cannot approve of this reasoning. The effect of it would be that a bridge which cost up to \$14,999 would be built entirely by local assessment, while a bridge costing \$15,001, or more, would be built entirely by general tax on the public, without regard to the fact that it might be of just as great local benefit, as the smaller bridge or fill; or might be entirely local in its purpose. Such a construction would be obviously unjust and ought not to be adopted unless the language is very plain and compelling.

It is plain that a bridge or fill costing more than \$15,000 or \$20,000 might be almost entirely local in its purposes. As, for instance, where it was not part of any general line of traffic, but furnished the only means of communication from its own locality to the general city streets. In such case there would be no public benefit except that of furnishing access to the particular locality, and this measure of public benefit, exists and must necessarily exist, in all local improvements. Again, the general public may already have a direct means of travel, generally paralleling the line of the proposed improvement, and the benefit of the improvement may be wholly or chiefly to give the abutting property access to these general lines of travel at both ends of the improvement. In either of these cases it would be plainly just that a part or all of the expense of the improvement, including the fills and bridges should be assessed upon the abutting owners.

We think the provisions of Sections 373 and 374 of the old charter, carried into the new by Section 284, and the provisions of Section 190 of the new charter, must be construed together; and that under their terms, the city council still has power and it is in its

discretion, and it may at its option (subject to the limitations of the charter) pay for such bridges wholly or partly by assessment (if 60 per cent of the property owners do not remonstrate), or if it has funds for such improvement, out of the half mill tax provided by Section 190. In other words, the provision of subdivision 4, Section 190, while perhaps mandatory as to the levying of a tax, is not mandatory but permissive as to what bridges, or what proportion of the cost of such bridges, shall come from that fund.

This conclusion seems strengthened by the latter clauses of Section 284 of the new charter which, as we have seen, provides:

“The council in the exercise of its general legislative power, may provide, in its discretion for the performance of *any public work* by or on behalf of the city and for the method of payment thereof * * and the right shall be preserved to the owners of 60 per centum in extent of property affected by any assessment for a local improvement, to defeat the same by remonstrance.”

4. Implied repeals are not favored and it must be supposed that the charter intended to preserve the provisions of Sections 373 and 374, except where the same are plainly and clearly repugnant to some other provisions of the charter. We think, in this case, they are not at all repugnant. In *Hochfeld v. Portland*, 72 Or. 190, 195 (142 Pac. 824), the court had under consideration the provision in the old charter, authorizing the city to levy a two mill tax on the property of the city, to provide a fund for the construction of bridges in the city, which should not cost less than \$15,000. Mr. Justice BURNETT, delivering the opinion of the court, says:

"This does not restrict the council to any particular manner of improving the street. The clause mentioned is permissive and not mandatory."

We think there has been no change in the charter, which affects the power of the council in regard to the manner of building bridges or making improvements, or takes away the right to build by assessment, even if the levying of a tax to provide a fund for that purpose should be construed as mandatory. It still leaves the council the discretion to build out of that fund, or in the other ways provided by the charter, if that fund should be insufficient or if the circumstances are such as to make it just to build as a local improvement.

This construction seems to be in line with the authorities generally in similar cases. In *Planting Co. v. Tax Collector*, 39 La. Ann. 455, 458 (1 South. 873, 876), there was a levee district which originally had power to make assessments against the property benefited to build levees. A provision of the Constitution of that state was that the—

"General assembly may divide the state into levee districts * * to that effect it may levy a tax not to exceed five mills on the taxable property situated within the boundaries of said district subject to overflow."

It was claimed that this provision was—

"A provision of the means for the exercise of the prior power granted, which is restrictive and impliedly prohibitive of a resort to any other means."

But the court refused to accept this theory, saying:

"It is obvious that the object of the last clause * * was not to exclude the power of local assessment but simply to confer the power of taxation."

In *Copeland v. Springfield*, 166 Mass. 498 (44 N. E. 605), there was a charter of the city providing that the

entire expense of constructing sidewalks should be assessed upon the abutting owners. Afterwards a general law was passed applicable to all cities, providing that such cities "may construct walks in any streets * * and may assess upon abutters, not more than one half of the expense." The city was proceeding under the old law and assessing the entire cost to the abutting owners. It was claimed the later act repealed the old law by implication, and that the assessment was invalid. The court held there was not such a repeal but that both laws stood and give the city a choice of remedies.

In *Borough of Greensburg v. Young*, 53 Pa. St. 282, the act in question, providing that the city might provide for "improving the streets and alleys" and "also to assess, levy and collect a tax for such purposes." It was claimed that this language excluded any power to levy local assessments for such purposes but the court held otherwise.

In Volume 1, Page and Jones on Assessments, Section 228, it is said:

"Accordingly, of two constructions, one of which will cause inconsistencies between parts of statute *in pari materia*, and the other of which will reconcile the statutes and prevent inconsistencies, the latter will prevail. Repeals by implication are not favored. Hence, if by one construction two statutes passed at different times may be construed together so as to give full force and effect to each, and by another construction they are inconsistent so that the later statute will operate as an implied repeal of the prior statute, the former construction will be preferred."

And again in Section 237 of the same work it is said:

"Since it is within the power of the legislature to confer upon a public corporation both the power to levy a general tax and the power to levy a local assess-

ment, with discretion to determine in which method it will pay for the improvement in question, a grant of power by the legislature to a public corporation authorizing it to levy a general tax to pay for a certain kind of public improvement does not abrogate another grant of power authorizing such corporation to levy special assessments to defray the expense of such improvements."

Judgment of the lower court is affirmed.

AFFIRMED.

Argued July 16, affirmed September 23, 1919.

IRWIN v. KLAMATH COUNTY.

(183 Pac. 780.)

Counties—District Attorney Unauthorized to Contract for Services in Procuring Evidence.

1. Laws of 1915, Chapter 141, Section 24, requiring district attorneys to prosecute diligently persons violating the act prohibiting the sale of intoxicating liquors, and Section 25, providing for payment by the County Court of expenses and disbursements incurred therein by and under the direction of the district attorney, do not authorize a district attorney as the county's agent to make a specific contract for services in procuring evidence specifying the amount the county shall pay, in the absence of statutory provision therefor, in view of Section 937, L. O. L., placing the contract power with the County Court. (Per **JOHNS** and **MCBRIDE**, JJ.)

Counties—District Attorney Unauthorized to Employ Agents to Ferret Out Violations of Liquor Law.

2. The words "expenses incurred and disbursements made by and under the direction of district attorney," in Laws of 1915, Chapter 141, Section 25, have reference to ordinary expenses, including amounts actually disbursed, or for which he made himself personally liable, such as hotel bills, railroad fare, etc., incurred while prosecuting violators of prohibition law, but does not include employment of agents by the month to travel over the county to ferret out possible offenders and gather evidence. (Per **BENNETT**, J.)

BEAN, J., dissenting.

From Klamath: **FRANK M. CALKINS**, Judge.

Department 2.

The plaintiff alleges that at all times hereinafter stated he was the duly elected, qualified and acting district attorney in and for Klamath County and that as such district attorney and as agent of the defendant, under the provisions of Chapter 141 of Laws of 1915, he employed one Wynn "to do and perform labor for the defendant in and about procuring evidence in the matter of the illegal sale of intoxicating liquors in Klamath County, Oregon, and obtaining and attempting to obtain evidence in prosecuting violators" of the prohibition law, at an agreed and stipulated price of \$85 per month from January 19, 1916, to February 19, 1916; and from February 19, 1916, to May 19, 1916, "at the agreed and stipulated price at the rate of \$100 per month."

There are four causes of action, all of a like nature and founded upon similar allegations, making a total of \$911.10, assigned to the plaintiff, who was then such district attorney, and for which he prays judgment against the county. It appears from the complaint that the plaintiff as district attorney audited and approved the claims against the county for such alleged services and that the claims were presented to and disallowed by the defendant.

The answer admits that the plaintiff was district attorney at the time alleged, but denies "that John Irwin was the agent of the defendant under the provisions of Chapter 141 of the General Laws of the State of Oregon, for the year 1915, or under the provisions of any other law." It further denies that he employed Charles D. Wynn or any other person for and on behalf of the defendant, denies every allegation in paragraph 2 of the complaint, "excepting defendant admits

that the claim mentioned was filed and that the defendant disallowed the same," and denies each and every other allegation of the complaint. Similar denials are made to each cause of action.

As a further and separate answer, the defendant alleges that at such times Marion Hanks was the duly elected and qualified county judge; that F. H. McCornack and John Hagelstein were commissioners of such county; that as such officers they had "the general care and management of the county property, funds and business of Klamath County, Oregon"; that C. C. Low was the sheriff and that John Irwin, the plaintiff, was the district attorney; that the defendant never employed Wynn, Otis, Moore or Bardin, the assignors of the plaintiff, or either of them, "to do or perform any labor for the defendant in and about procuring evidence in the matter of the sale of intoxicating liquors or in obtaining or attempting to obtain evidence in prosecuting violators of the laws of the State of Oregon"; that the plaintiff was never authorized to employ them, and that neither of them ever rendered any service to Klamath County, as alleged or otherwise. As an affirmative defense it is alleged that the officers of Klamath County were at any and all times ready and willing to aid and assist the district attorney in obtaining evidence and prosecuting violators of the prohibition law, and the employment of such individuals for this purpose was unnecessary and unauthorized.

After his motion to strike was overruled, the plaintiff filed a general demurrer to the further and separate answer, which was overruled, and the defendant then filed a reply in the nature of a general denial. A jury was waived and trial was had before the court, which found for the defendant. Judgment was en-

tered against the plaintiff for costs, from which he appeals, assigning sixteen different errors, the substance of which is that the court "erred in determining the facts in the case" and "should have rendered judgment for the plaintiff."

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. W. H. A. Henner*.

For respondent there was a brief and an oral argument by *Mr. C. J. Ferguson*.

JOHNS, J.—1. The complaint is founded upon a specific contract between the plaintiff as district attorney and agent of the defendant, to recover the agreed and stipulated price of alleged services rendered by Wynn and others to the defendant. It is contended that the plaintiff as such district attorney had legal authority to make such contracts; that he did make them and that by reason thereof the county is liable for the amount of the agreed price. In a measure this involves the construction of Chapter 141, Laws of 1915, known as the Prohibition Act, and the powers and duties of the district attorney under this act. The primary purpose of this law is to prohibit the manufacture and sale of intoxicating liquors and to make it the duty of city, county and state officers to see that it is enforced. Section 24 of the act provides that "it shall be the duty of the district attorneys in this state to diligently prosecute any and all persons violating any provisions of, and otherwise to enforce, this act in their respective counties"; that for any failure or neglect to perform such duty the officer shall be deemed guilty of a misdemeanor and subjected to fine and imprisonment, and that whenever any prosecuting officer

shall fail or neglect to enforce these provisions, the Governor, as the chief executive officer of the state, shall appoint prosecutors in his discretion, who shall perform like duties and have like powers as the district attorney. Section 25 provides:

“All expenses incurred and disbursements made by or under the direction of the district attorney, or the prosecutor appointed by the Governor, in obtaining or attempting to obtain evidence, or otherwise, in prosecuting violators of this act, shall be paid by the County Court of the county in which violation shall be alleged to have been committed, upon the voucher of said district attorney or prosecutor appointed by the Governor, out of the general fund of said county.”

The alleged services were performed at the instance and request of the district attorney and not by a prosecutor appointed by the Governor.

There was a general denial of the contract and the performance of services. The case was tried without a jury by the court, which found for the defendant. Assuming, without deciding, that all expenses incurred by the district attorney should be paid by the County Court, the statute does not authorize the district attorney as the agent of the county to make a specific contract for such services or to define or specify the amount which the county shall pay, and in the absence of statutory provision the district attorney would not have the legal right to execute a contract which would be binding on the county. Section 937, L. O. L., enacted in 1862, provides that the County Court has the authority and powers pertaining to county commissioners to transact county business and that it shall have “the general care and management of the county property, funds and business where the law does not otherwise expressly provide.” Without

an express provision in the statute or an authorized contract, a county should be required to pay only the reasonable value of any services or labor performed. In the case of *Brewster v. Springer*, 80 Or. 68 (156 Pac. 433), upon which the plaintiff relies, the statute expressly provided the compensation in dispute. There is no such provision in Section 25 of the Prohibition Act. If the county is liable for the alleged services, it is liable only for the reasonable value thereof. The plaintiff seeks to recover upon a specific contract for services rendered at an agreed and stipulated price, and does not allege or prove the reasonable value thereof.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

McBRIDE, C. J., concurs.

BENNETT, J., Concurring in Result.—I concur in the result reached by Mr. Justice JOHNS.

2. I think the words "expenses incurred and disbursements made by or under the direction of the district attorney" had reference to ordinary expenses and disbursements of such officer, which he either actually disbursed or for which he made himself personally liable, such as hotel bills, railroad fare, etc., which were incurred while in the prosecution of violators of the prohibition law.

It was not, it seems to me, the intention of the legislature to give the district attorney power, under this clause, to employ agents by the month to travel over the country in the ferreting out of possible offenders of this kind.

If the district attorney has this power it must also belong to any of the special prosecutors appointed by the Governor, as the two are coupled together in the

clause in regard to expenses. Again, if both the district attorney and any other prosecutor appointed by the Governor, have the power to employ agents and fix their fees, then these other agents if directed by the district attorney or the special prosecutor, may in their turn appoint still other agents and so the process might go on unendingly.

It seems to me this construction should not be given to the act unless the language employed by the legislature is entirely plain and compelling. If the legislature had intended anything of this kind it would no doubt have plainly provided that the district attorney might appoint and employ other agents. Any such authority to involve the counties in liability by the wholesale ought not to be implied from any doubtful or uncertain words.

BEAN, J., Dissenting.—This appeal is taken by the plaintiff. It involves the payment of expenses incurred in 1916 under the direction of the district attorney for that county in obtaining or attempting to obtain evidence of a violation of Chapter 141, Laws of 1915, relating to intoxicating liquors. The district attorney employed certain persons to act as detectives. They were to make an investigation and endeavor to obtain such evidence. That officer duly certified to the claims for such expenses, and the same were presented to the County Court for that county and disallowed, whereupon an assignment of the claims was made to the plaintiff, and an action instituted to collect the amounts. As indicated in the brief on behalf of defendant, there is no dispute in regard to facts. The defendant contends that the claims are not legal claims against the county, principally for the reason that they were never authorized by the County Court. It is

also urged that the incurrence of the indebtedness was unnecessary, that the regular officers of the county were able and willing to give every assistance to the district attorney in the enforcement of the law, and that consequently the district attorney was without power to bind the county or to engage the services of the so-called detectives.

It is also asserted on behalf of the defendant that the plaintiff failed to show that there had been violations of the prohibition law in Klamath County, or that the regular officers of the county, and City of Klamath Falls refused or failed to assist the prosecutor in the enforcement of the law.

It seems that it is a sufficient answer to the contention made on behalf of the defendant that the very language of the act, Section 25, plainly requires the County Court to pay such expenses "upon the voucher" of the district attorney or prosecutor, appointed by the Governor, out of the general fund of the county. That section, *inter alia* commands that:

"All expenses incurred and disbursements made by or under the direction of the District Attorney, or the prosecutor appointed by the Governor, in obtaining or attempting to obtain evidence, or otherwise, in prosecuting violators of this Act, shall be paid by the County Court of the county in which violation shall be alleged to have been committed, upon the voucher of said District Attorney or prosecutor appointed by the Governor, out of the general fund of said county."

In other words, the statute is mandatory and the County Court under its terms, when such expenses have been incurred and properly certified to and vouched for by the district attorney or prosecutor, has no other recourse except to allow them to pay the same. It is urged on behalf of the county that the

employment of a detective or attempting to obtain evidence in regard to the violation of the statute rests solely with the County Court; that it is a judicial matter and the district attorney is not authorized to perform such a function. The application of the principle involved is not new. In *Brewster v. Springer*, 80 Or. 68 (156 Pac. 433), a similar question was involved. There the water commissioner incurred expenses of a water-master and vouched the same to the County Court under Section 6619, L. O. L., and the county resisted the payment of the amount. In that case, Mr. Justice EAKIN said:

“Where the claim is properly presented in the manner hereinbefore indicated, we think the County Court has no discretion to refuse to allow it. Section 6619, L. O. L., is mandatory. It provides that upon the presentation by the water-master of his claim, approved by the division superintendent and accompanied by the written demand of the water users, the County Court shall allow it. A claim so approved and accompanied with the demand, if the services were rendered upon the demand of the water users, is absolutely conclusive upon the County Court. If the services were rendered upon the order of the division superintendent, the claim, if approved by him, is likewise conclusive, and the court cannot go behind such approval.”

The same question was before this court again in *Brewster v. Crook County*, 81 Or. 435 (159 Pac. 1031), and the principle annunciated by Mr. Justice EAKIN was applied and the statute enforced. As to the act being a judicial one for the County Court instead of for the district attorney, a similar question was passed upon by this court in *Evanhoff v. State Industrial Accident Commission*, 78 Or. 503 (154 Pac. 106). In that case it was urged that the act in question conferred judicial and legislative functions upon the

Industrial Accident Commission, and was therefore in contravention of Article III, Section I, of the Constitution. Mr. Justice McBRIDE disposed of the question at page 515 of the opinion (154 Pac. 1, 10), in the following language:

"This identical question is passed upon adversely to plaintiff's contention in *Re Willow Creek*, at pages 610, 611 of 74 Or. (144 Pac. 505, 146 Pac. 475), and that opinion and the authorities there cited are so conclusive as to render further discussion of the subject unnecessary."

On page 516 of 78 Or. (on page 110 of 154 Pac.), the same learned jurist said after quoting Article VII, Section 1, of the Constitution, as amended in 1911 (see Laws of 1911, page 7):

"It would appear that the power of the legislature or of the people to confer judicial powers upon any tribunal which it or they may select is, by the force of this amendment, practically an unlimited one so long as the different functions of government, executive, legislative and judicial are not so blended as to contravene Section 1, Article III, of the Constitution, which, as shown in the case last cited, is not the case here."

We apprehend that the same rule of construction would be adopted in considering a statute enacted for the purpose of decreasing the use of whisky as a beverage, that would be applied to one passed to facilitate the use of water. Indeed, Section 937, L. O. L., providing that the County Court shall have authority and powers pertaining to county commissioners to transact county business, and that it shall have "the general care and management of the county property, funds, and business, *where the law does not otherwise expressly provide*" seems to contemplate that the legislature may at any time enact a law for the man-

agement of the county business by an official, or a tribunal, other than the County Court. In *Flagg v. Marion County*, 31 Or. 18 (48 Pac. 693), it was held that the power expressly conferred on the county clerk by Section 47 of the statute commonly known as the "Australian Ballot Law" (Laws 1891, pp. 14, 23), to cause the official ballots to be printed, implies the power to bind the county by a contract for such printing, subject to the limitation that the price agreed to be paid must be reasonable. And in the case of *Burrell v. City of Portland*, 61 Or. 105, at page 111 (121 Pac. 1, at page 3), this court said:

"Whenever a power is given by statute, everything necessary to make it effectual is implied. It is a well-established principle that statutes containing grants of power are to be construed so as to include the authority to do all things necessary to accomplish the object of the grant. The grant of an express power carries with it by necessary implication every other power necessary and proper to the execution of the power expressly granted: *Lewis' Sutherland, Statutory Construction*, § 508."

As to the contention that the district attorney could only incur such expenses after an indictment was returned or a complaint filed and a prosecution was actually pending for a violation of the statute, a reading of the statute indicates that it contemplates that the investigation to be made, or the endeavor to obtain evidence of the violation of the law, is for the purpose of ascertaining whether or not there has been an infraction of the statute; and if a breach of the law is detected that the evidence thus obtained will be used in the prosecution of the violator. While it may be true that the law-breakers would desire that no means be afforded for obtaining evidence of a violation of the prohibition law before a criminal action was actu-

ally pending in court, as in that event there would probably be few, if any, prosecutions for a violation of this statute, it would not be charitable to entertain the view that the lawmakers had any such intent in mind. The law is drastic, and plainly provides for a rigid enforcement thereof. By Section 24, the district attorney is enjoined to diligently prosecute all persons violating any of the provisions of the act, and to enforce the law. If any district attorney, or prosecuting officer fails, neglects or refuses faithfully to perform any duty imposed upon him by the act, provision is made that upon conviction thereof such official shall be punished by a fine or imprisonment in the county jail, and such conviction requires a forfeiture of his office. It provides that in case of the inability or neglect, or refusal of any prosecuting officer to enforce the provisions of this act, the Governor shall appoint as many prosecutors as he may deem necessary; and designate their salary or compensation. Section 25 plainly provides that the salary or compensation allowed under this act shall be paid by the County Court of the county to which said prosecutor may be assigned, and also in compulsory terms requires that all expenses incurred and disbursements made by or under the direction of the district attorney, or the prosecutor appointed by the Governor, in obtaining or attempting to obtain evidence, or otherwise, in prosecuting violators of this act, shall be paid by the County Court of the respective county. The law does not make it necessary that the district attorney shall show that there have been violations of the law nor that there has been a failure on the part of the regular officers to assist in the enforcement thereof, as a condition precedent to the employment of a detective and the incurring of expenses to be paid by the

county. That part of the statute relating to expenditures like those involved herein was obviously inserted to overcome the difficulty portrayed in the case of *Cunningham v. Umatilla County*, 57 Or. 517 (112 Pac. 437, 37 L. R. A. (N. S.) 1051). There the payment of the services of a detective employed in procuring evidence against the offenders against the local option law which were ordered to be paid by the County Court was contested by a taxpayer.

It seems to the writer that it was plainly the intent of the lawmakers not only to require a diligent investigation and enforcement of the prohibition law, but also to provide the means of defraying expenses thereby incurred by the prosecutor. The result of the efforts made under the direction of the district attorney and some of the prosecutions instituted are mentioned in the record. The reasonableness of the amount of the expenses incurred is not questioned in this proceeding. The facts are practically undisputed.

Under the authority of the cases above cited heretofore presented to this court, the judgment of the lower court should be reversed, and judgment entered as prayed for in the complaint.

Argued June 26, affirmed September 16, rehearing denied September 30, 1919.

RICE v. DOUGLAS COUNTY.

(183 Pac. 768.)

Highways—Saving Clause of Repealing Statute Preserves All Road Improvements Pending.

1. The saving clause of the County Road Act of May 20, 1917, providing that, notwithstanding repeal of existing statutes, such statutes should continue in force for purposes of completion of any highway proceedings previously instituted, covers the case of a highway proceeding instituted under Laws of 1903, page 264, Section 11 (Sections 6284-6286, L. O. L.), the intention of the legislature having been to preserve all pending proceedings for establishment of roads.

Statutes—Statutes Should not be Construed Retrospectively to Interfere With Judicial Proceedings.

2. Unless there is a clear intent to the contrary, statutes should not be construed retrospectively, or so as to interfere with pending judicial proceedings.

Highways—When Court Opening Highway may Follow Old or New Procedure.

3. In view of the saving clause of the highway statute of May 20, 1917, after the going into effect of such new statute, repealing prior statutes, the County Court, in opening a county road, could follow either the old or the new procedure in a pending proceeding instituted under the old statutes.

Highways—When Evidence of Posting of Notices for Establishing Highway Sufficient.

4. In a proceeding to establish a county road, instituted under Laws of 1903, page 264, Section 11 (Sections 6284-6286, L. O. L.), and continuing under the new and repealing statute of May 20, 1917 (Laws 1917, p. 588), posting of notices in three public and conspicuous places in the vicinity of the road, and one on the bulletin-board at the county courthouse, held a compliance with law, so that an affidavit stating that one copy of the notice was posted in a public and conspicuous place near the center of the proposed road was sufficient proof, the center of a road being a point in the middle of the road equidistant from the termini.

Time—Filing Report of Establishment of Highway Day After Holiday Sufficient.

5. It being impossible to file on June 5th, the day of the general primary election, and a public holiday by proclamation of the Governor, the report of viewers and county surveyor directed to locate a proposed county road, a filing on the next day was sufficient, and the court did not lose jurisdiction because the report was not filed on the holiday, as prescribed in the order.

[As to exclusion or inclusion of Sunday or holiday in computation of time, see note in Ann. Cas. 1917E, 942.]

Highways—When Notes of Viewers and Surveyor Sufficient.

6. Where field-notes of the county surveyor and viewers of a proposed county road showed the beginning point and terminus of the road, and every angle, direction and distance between the point of beginning and the terminus, their preliminary report substantially complied with the act of May 20, 1917 (Laws 1917, p. 588), and the road was duly established by order to that effect; the placing of permanent monuments, etc., not being necessary to constitute the road a public highway, while failure to make final survey and to monument the road does not avoid the order of establishment.

Highway—Right to Review Establishment not Waived by Appeal from Assessment.

7. The right to review proceedings to establish a county road or highway is not waived by an appeal from the assessment of damages to premises through which the road is laid out.

Highways—Qualification of Viewers Sufficiently Shown by Report.

8. The recital in the report of viewers of a proposed county road or highway that before commencing their labors they took an oath faithfully and impartially to discharge the duties of their appointment is sufficient showing that the viewers qualified as required.

From Douglas: JAMES W. HAMILTON, Judge.

Department 1.

This proceeding was brought to review the action of the County Court of Douglas County in establishing a county road through plaintiffs' premises. On the twenty-third day of April, 1917, a petition was filed in the County Court, sufficiently specifying the termini and general route of the proposed road, with the following proof of posting of notices, omitting the formal parts of the affidavit:

"I, G. O. Willis, being first duly sworn on oath say that I posted three notices (a copy of which is hereto annexed) of the proposed road, in the following places, to-wit: One at the beginning of said proposed road; one at the termination of said proposed road, and one near the center of said proposed road, all being public and conspicuous places in the vicinity of said proposed road, and in Douglas County, Oregon, and one at the Court House door in Roseburg, Douglas County, Ore-

gon, 30 days prior to the presentation of the petition herewith, to wit: on March 23d, 1917."

On May 2, 1917, the County Court made an order in the usual form, appointing M. R. Germond county surveyor, and J. B. Large and John L. Chapman viewers, and directing them to meet at the beginning point of said road, as described in the petition, on the twenty-fifth day of May, 1917, and view out and locate said road upon the most practical and feasible route, to assess damages and benefits, and to make an estimate of cost of opening the road, and to make such other recommendations or give such information for or against the location thereof, as might be useful, and file their report on or before June 5, 1917. June 5, 1917, being a public holiday, the report was filed the next day, June 6th.

The method of procedure, required at the time the petition was filed, is set forth in Section 11, p. 264, Gen. Laws 1903, which section constitutes Sections 6284, 6285, 6286, L. O. L. We quote the original statute, as the sectionizing is somewhat confusing.

"Section 11. It shall be the duty of the board of county road viewers, after receiving at least five days' previous notice by one of the petitioners, to meet at the time and place specified in the notice of the County Court aforesaid, or within five days thereafter, and after taking an oath or affirmation, if not already a sworn officer, faithfully and impartially to discharge the duties of their appointment, shall take to their assistance such persons as they may deem necessary, and proceed to survey, view, lay out, alter, straighten, or re-establish such road in the following manner: starting at the initial point asked for in the petition, and following the most practical route, a preliminary line shall be run for the purpose of determining the practicability of said road. All trees on the line of such road shall be marked on each of the sides corre-

sponding with the direction of the road with three notches cut through the bark, and at least one inch into the wood, and all trees adjacent to the line shall be plainly blazed on the side facing the road. The beginning and termination of such road and the termination of each mile thereon shall be designated by a tree, if one is found at the point, if not, then by a stone containing at least one thousand seven hundred and twenty-eight cubic inches, if such stone can be found in the vicinity, if not, then by a post of durable wood, at least four inches square and three and one half feet long, firmly planted not less than eighteen inches in the solid ground. When posts are used, two bearing-trees shall be chosen, the course and distance of each of which from the post, the diameter of the tree and the kind of wood shall be noted by the surveyor. If no stones can be obtained, and no trees suitable for bearing-trees can be found, the surveyor shall cause a mound to be erected by compact earth around the post, eighteen inches high and four feet square. The beginning and terminating points of the road, whether trees, posts, or stones, shall be marked by the letter 'R.' The termination of each mile shall be marked by a figure indicating the number of the mile from the beginning of the road followed by the letter 'M.' The marks required by this section, if occurring on stone, shall be cut legibly at least one eighth of an inch deep; if occurring on trees or posts, they shall be plainly cut at least one fourth of an inch deep in the solid wood, the bark having been first removed. All bearing trees shall be marked on the side facing the post to which they correspond with a figure and letter, the same as that on the post cut into the solid wood in the same manner as other trees are required to be marked. The surveyor shall, after the completion of the preliminary survey, make such a plat as is necessary to show the alignment of the proposed route and the general topography adjacent, together with a profile showing the grade obtainable; and he shall also mark, out of the material obtainable along the proposed route, the character of the ground, together with

any other information bearing upon the subject in hand. If the route is found to be practicable, the board of county road viewers shall proceed to make the final location of the road, and upon the completion of the same, the surveyor shall deposit with the county clerk of the county where said road is located, a complete set of field notes, showing the ties to the government corners along the route, the location and witnesses to the mile posts, and the beginning and terminating points of the road. He shall also deposit a plat showing the alignment of the proposed road, which plat shall show all the courses, the location of all the mileposts, the ties to the government corners, where obtainable, the location and approximate size of all creeks, rivers, swamps, cuts, and fills. He shall also deposit with the county clerk a profile showing the grades and their per cent, the location of all water courses, rivers, swamps, and other natural features that may be important. The location of all culverts, box drains, bridges, tide boxes, and all highway, railroad, and other crossings, and the amount of excavation and embankment, and an estimate of the total cost of construction, together with any other information and details that may be useful in connection with the improvement of such road. The other members of the board of county road viewers shall also make out a report, in writing, stating their opinion in favor of or against the establishment or alteration of such road and set forth their reasons for the same, which report shall be delivered to the said county clerk at the same time and in the same manner as that prescribed for the surveyor: *Provided*, that when the board of county road viewers are of one opinion they may each sign the report. It shall be the duty of the county court on receiving the said report, or reports, to cause the same to be publicly read on two different days of the same term; and if no remonstrance with a greater number of remonstrators than there is of the petitioners upon the petition (be received) (*provided, however*, that no one shall be deemed a remonstrator except a freeholder residing in the road district where

such road is located) and no petition for damages be filed, and the court is satisfied that such road will be of public utility, the report of the viewers being favorable thereto, they shall cause said reports, survey, profile, and plats to be recorded in suitable books kept for that purpose, and from thenceforth said road shall be considered a public highway, and the court shall issue an order directing said road to be opened. In case the board of county road viewers shall file conflicting reports, the county court may elect which report they will accept, and thereafter proceed as though the report accepted were unanimous."

Under this statute a road was not definitely established until the final report of the viewers was filed and approved. In February, 1917, the legislature passed a new act, providing for the procedure in the laying out and location of county roads, and repealing, among others, Sections 6284, 6285, 6286, L. O. L., with a reservation hereafter to be considered. This law became effective May 20, 1917, which was five days before the viewers met to lay out and locate the road in question. The procedure, under the 1917 law, while similar to that required by the 1903 law, was in some respects different. The method of survey prescribed by the latter statute was as follows:

"Starting at the initial point designated in the petition or resolution, and following the most practicable route, a preliminary line or other lines may be run for the purpose of definitely locating the center line of said road and determining the practicability of said road and the necessity therefor. Said board shall assess and determine how much less valuable the premises through which the said road is located, or is to be located, are, and set forth the same in their report; and such report, when adopted by the county court, shall be taken and considered to be the true damages suffered by anyone through whose premises such road is located. The board of county road viewers shall

also make out a report, which shall be in writing, stating its recommendation in favor of or against the establishment or alteration of such road, and shall set forth the reasons for the same. In the event that all members of the board of county road viewers fail to agree, separate reports may be filed, and the county court may elect which report it will accept, and thereafter proceed as though the report accepted were unanimous. The surveyor member of said board of county road viewers shall make a plat of the preliminary line or other survey, showing the alignment of the proposed road and the general topography adjacent, and showing the ties to Government corners along the road where available. Said plat and the report or reports shall be filed in the office of the county clerk on or before the date fixed by the county court in its order for the appointment of said board of county road viewers."

Section 13 of the Act of 1917 required the report of the viewers to be read on two different days of the next regular term following the filing of the report.

Section 14 provided that persons interested might file remonstrances or claims for damages at any time before the expiration of the day upon which the report should be read the second time.

Section 15 is as follows:

"REPORT CONSIDERED BY COURT. On the day following the second reading of said report, the county court shall consider said report, and if no petition for damages, or remonstrance with a greater number of remonstrators than there is of the petitioners upon the petition, be filed within the time hereinbefore prescribed, and if the court is satisfied that such road will be of public utility and the amount of the damages assessed is just and equitable, and the report of the viewers being favorable thereto, said court shall thereupon adopt said report and enter an order directing warrants to be issued to the persons and in the amounts designated in the report, and further direct-

ing said road to be finally surveyed and opened, and from the date of said order such road shall be a public highway."

Section 16 provided that if a claim for damages should be filed, the court should direct the board of viewers to consider the same, and for that purpose the court might, from time to time, postpone the hearing to a day certain but not longer than two consecutive terms. It was further provided that if the petition for damages should be allowed wholly or partly and such award should be accepted by the claimant, the County Court should make an order adopting said report as modified and should make an order establishing the road; but that if the petition should be denied, the court should enter an order establishing the road, but no such order should be final or operate to establish the road unless the time for taking an appeal to the Circuit Court should have expired. There were provisions for immediate opening of the road under certain circumstances not material here.

Section 19 of the 1917 law is as follows:

"County Surveyor to Monument Road and Prepare and File Permanent Record Thereof. When a proposed road is established, upon the final hearing thereon, the county court shall notify the county surveyor thereof, who shall forthwith proceed to survey and monument said road along the alignment established by the final order of the county court, and prepare and file final records thereof.

"In the final survey the termini of said road, and, where practicable, the beginning and ending of each curve or each angle point thereon, shall be designated by permanent monuments or posts, bearing trees, or compact earth mounds in such positions that they will not be disturbed by the construction of said road. Where lettered, all monuments shall be marked by the letter 'R.' Any monument of iron shall be a rod or

pipe at least thirty inches in length and five-eighths inch in diameter, and any monument of stone shall contain at least one thousand cubic inches and shall be at least twelve inches in one dimension. All monuments shall be fully described in the field notes of such survey and their courses and distances given from the points to which they refer.

"The county surveyor shall make and file with the county clerk of the county, a complete set of field notes, together with a plat and a profile. The plat shall show the alignment of the road, the courses and distances, ties to Government corners, and natural watercourses and any other available and necessary data (data). The profile shall indicate the grades obtainable and natural topography. The grade shown on said profile shall not be deemed established, but shall be subject to change as circumstances require."

Section 21 provides for the initiation of proceedings to lay out and locate county roads by resolution of the County Court without petition. The proceedings, as to notice, etc., are similar to like proceedings by petition. A like provision is contained in Chapter 347, Laws of 1913. There was a repealing clause of the act of 1917, which practically purported to repeal all the law in relation to procedure in laying out county roads then in existence, but the act contained the following reservation:

"SAVING CLAUSE. Notwithstanding the repeal of the existing statutes of this State by the provisions of this Act, the said original sections and statutes shall continue in force and effect for the purpose of the completion of any highway proceedings heretofore instituted by the officers herein designated."

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. B. L. Eddy*.

For respondents there was a brief and an oral argument by *Mr. George Neuner, Jr.*, District Attorney.

McBRIDE, C. J.—1, 2. We are of the opinion that the saving clause above mentioned is broad enough to cover the proceeding at Bar, and that the intent of the legislature was to preserve from destruction all pending proceedings for the establishment of county roads. The petition may fairly be construed to be a request, in legal form, to the County Court to cause the machinery of the law to be set in motion to lay out a county road and, if necessary, to condemn land for that purpose. The petitioners do not technically institute the proceedings, but request the County Court to do so. After such petition, with proof of notice, is filed, the county becomes the active party and may fairly be said to institute all the proceedings, as between itself and the parties over whose land the proposed road is to pass. It is a rule of statutory construction, as well as of sound public policy and justice, that unless there is shown a clear intent to the contrary, statutes should not be construed retrospectively, or so as to interfere with judicial proceedings then pending: *Lewis' Sutherland on Stat. Cons.*, § 238. This rule, we must assume, was known to the legislature when the act of 1917 was adopted. The legislators must have known and appreciated the fact that, as a matter of course, many unfinished road proceedings were pending in the counties of this state, and it is unthinkable that it was the legislative intent to ruthlessly deprive the County Courts of the jurisdiction to complete these and to require the whole proceedings to be begun over again. The savings clause, while crudely drawn, was no doubt intended to preserve the

jurisdiction to complete the proceedings already begun under the old law.

3. The new law, while preserving the jurisdiction, provided a new procedure for its exercise. The jurisdiction, being preserved, the County Court, after May 20th, had a choice of procedure. If necessary, it could follow the previous law; but if the procedure under the new law was deemed more convenient at the particular stage to which the proceeding had gone, there is no reason in the world why it should not be employed. The latter procedure was chosen in this case and if it has been substantially followed, the road has been lawfully located: *Drainage Dist. v. Bernards*, 89 Or. 539, 555 (174 Pac. 1167).

4. It is objected that the proof of posting notices of the proposed road is insufficient because the affidavit states, among other things, that one copy of the notice was posted in a public and conspicuous place "near the center of the proposed road." It is contended that the affidavit is indefinite in that the term "near" is merely a relative term and, in the connection used, does not locate any particular point. The center of a road would be a point in the middle of the road, equidistant from the termini. The proposed road, not having been surveyed, it was of course impossible to locate such point with mathematical exactness. The affidavit further shows that the place where the notice was posted was in the "vicinity of the proposed road and in a public place." The finding of the court is, that "the notices were posted in three public and conspicuous places in the vicinity of said road and one on the bulletin-board at the Douglas County courthouse." We think this complies with the requirements of the law, as laid down in the later decisions, and particularly with *Latimer v. Tillamook County*, 22 Or. 291

(29 Pac. 734); *Cameron v. Wasco Co.*, 27 Or. 318, 324 (41 Pac. 160). In the latter case there was no averment in the affidavit that the places where the notices were posted were public places, nor any finding to that effect by the court. In an opinion sustaining a writ of review, Justice MOORE said:

"Had the journal entry of the County Court recited that satisfactory proof had been given by advertisement, posted at the place of holding the County Court, and also in three public places in the vicinity of the proposed road, it would be presumed that jurisdiction had been acquired, though the affidavit of posting was ambiguous in its statement of facts."

It is true that the court, in *Minard v. Douglas County*, 9 Or. 206, and in *King v. Benton County*, 10 Or. 512, speaking through Justice WALDO, announced a rule that would, if now adhered to, reject the proof of posting offered in the case at Bar. In fact, the requirements as to notices were so technical as announced in these opinions, that they have been disregarded, if not expressly overruled in later decisions.

In *Vedder v. Marion County*, 22 Or. 264 (29 Pac. 619), STRAHN, C. J., referring to *Minard v. Douglas County*, 9 Or. 206, says:

"We deem it a fitting occasion to say, in relation to that case, as well as the case of *King v. Benton County*, 10 Or. 512, which followed it, that they introduced a degree of strictness and technicality into the practice, in the matter of the location of county roads, that renders it unnecessarily onerous and expensive, and which is at variance with the entire course of procedure which had prevailed here since the territorial days and up to the time those cases were decided. Nor did the court seem to give any weight whatever to the principles of contemporary construction in such case, which is frequently allowed to have a controlling effect in such matters. Viewing these cases in that light, the

tendency is now to limit their doctrines, or at least to see that they are not extended."

5. It is claimed that the court lost jurisdiction because the report was not filed on the day prescribed in the order, namely: June 5, 1917. June 5th was the day of the general primary election and was a public holiday by proclamation of the Governor. It being impossible to file the report on that day, we think a filing on the next day was sufficient. Whether it was filed before or after court convened does not appear. *McMillan v. Mason*, 70 Or. 133 (140 Pac. 446), is cited as sustaining plaintiffs' contention. In that case the viewers allowed three months and two terms of court to pass before filing their report. And there was no sufficient affidavit or finding by the court to show a compliance with the law in regard to posting. Justice MOORE held the proceedings void for this reason, and by way of *dictum* remarked in substance: "It is believed" that a proper construction of the statute required the viewers to make and file their report before the commencement of the next term of court. The question was not necessarily involved and the conditions were different from those existing in this case, where the intervention of a holiday rendered it impossible to file the report upon the return day.

The question is one not free from difficulty, but we are of the opinion that the report was filed in time. It is very evident that plaintiffs were not injured in any way by the failure of the viewers to file their report a day earlier and while this circumstance would not avail if there were an injunction of the statute requiring the report to be filed at a particular time, yet we do not feel inclined to construe into the law a requirement which it does not contain, in order to defeat a proceeding which seems fair and regular.

6, 7. The preliminary report of the viewers and surveyor seems substantially to comply with the Laws of 1917. The field-notes show the beginning point and terminus of the road and every angle, direction and distance between the point of beginning and the terminus. This shows the thread of the road which is all that the Law of 1917 requires, before directing its permanent location and declaring it a public road. The placing of permanent monuments, milestones, etc., is a matter of detail to be attended to later, and is not necessary to constitute the road a public highway. The failure to make a final survey and monument the road does not render the order establishing it void. If that work is unduly delayed by the surveyor, the County Court, or perhaps any citizen interested, may bring appropriate proceedings to compel him to perform his duty, but such failure cannot be urged upon a review of the proceedings relative to the location and establishment of the road. While a reference thereto is probably not required here, it is proper, in view of the importance of the subject, to say that the right to review the proceedings is not waived by an appeal from the assessment of damages.

8. It is also contended that there is no sufficient showing that the viewers qualified, as required by law. The report of the viewers states that before commencing their labors they took an oath to faithfully and impartially discharge the duties of their appointment. According to the weight of authority such a recital in the report is sufficient: *Husted v. Town of Greenwich*, 11 Conn. 383; *Wood v. Campbell*, 14 B. Mon. (Ky.) 422; *Town of Huntington v. Birch*, 12 Conn. 142; *Dollarhide v. Board of Commissioners of Muscatine Co.*, 1 Greene (Iowa), 158. The latter case intimates that even if there had been no mention of the fact in

the report, the presumption would have been that the viewers complied with the law and took the necessary oath of office before entering upon their duties.

It is unusual for an officer to state in his return that he has taken the oath required by law, and it seems to the writer that it is wholly unnecessary where the law does not require a record of such oath, to make any return concerning it; however, the decision of that question is unnecessary, as the report complies with the requirements of the better authorities on that subject.

We fail to find any failure of jurisdiction, or any error affecting the substantial rights of the plaintiffs; therefore the judgment of the Circuit Court is affirmed.

AFFIRMED.

BURNETT, BENSON and HARRIS, JJ., concur.

Argued September 13, reversed and remanded September 30, 1919.

KUNTZ v. EMERSON HARDWOOD CO.*

(184 Pac. 253.)

Pleading—Identity of Causes not Established by Plea that Other Action was for Same Amount.

1. Identity of causes of action is not established by plea of other action pending, stating that the other action was for the same amount.

Pleading—Plea of Identity of Parties and Subject Matter of Other Action a Conclusion of Law.

2. It is no more than a conclusion of law for a plea of other action pending to say that it involves the same parties and the same subject matter.

*On duties of master and servant with regard to rule promulgated for the safe conduct of a business, see notes in 43 L. R. A. 305, and 9 L. R. A. (N. S.) 972.

Authorities passing on the duty of master to adopt rules to protect servant, or to warn him against dangers not reasonably to be apprehended, are collated in a note in 21 L. R. A. (N. S.) 89.

REPORTER.

Pleading—Plea that New Trial was Granted After Time Allowed by Law a Conclusion of Law.

8. Allegation of reply to plea of other action pending, that order granting new trial in such action was entered after the time allowed by law, is a mere conclusion of law.

Abatement and Revival—Grant of New Trial After Time Limited Does not Affect Judgment of Nonsuit.

4. The granting of new trial after the time limited by Section 175, L. O. L., as amended by act of February 18, 1911 (Laws 1911, p. 152), providing that the motion shall be determined within 60 days from the entry of judgment, and not thereafter, and if not determined within that time shall be conclusively taken and deemed as denied, does not affect the prior judgment of nonsuit, so that such action is not pending, as regards a plea of abatement to a subsequent action for the same cause, maintainable under Section 184, notwithstanding the nonsuit.

Master and Servant—Whether Employee was at Work in Scope of Employment Question for Jury.

5. Under the evidence, in action for death of employee, held that it was a question for the jury whether he, in going from his place as an off-bearer for a rip-saw to another place in the same room to put on a belt was within the scope of his employment.

Negligence—Contributory Negligence Reduces Recovery Under Employers' Liability Act.

6. For an employee to go from his place as an off-bearer for a rip-saw to another place in the room to put on a belt, in doing which he was killed, was at most contributory negligence, which under Employers' Liability Act, Sections 1, 4, 6, merely reduces recovery for his death from failure of the employer to use every means practicable for protecting life from machinery.

Master and Servant—Evidence of Want of Rules in Factory not Objectionable for Remoteness.

7. It was permissible, in an action for death of employee in putting on a belt, to show that eight months before the accident there were no rules or regulations in the factory regarding adjustment of the belt, objection of remoteness going rather to its weight than its competency.

Master and Servant—Disregard of Warning Evidence of Contributory Negligence.

8. As tending to show contributory negligence, as basis for reduction of damages under Employers' Liability Act, master may show that when deceased started to put on belt he was warned, by the man in charge of the saw at which he worked, not to put it on, but to leave it alone.

Master and Servant—Labor Commissioner's Certificate Evidence That Employer Complied With His Duty Within Factory Act.

9. Defendant, in an action under Employers' Liability Act for death of a servant in putting on a belt, was entitled to have admitted the labor commissioner's certificate for the year, that the factory conformed to the Factory Act, Section 5040, L. O. L., et seq., as

prima facie evidence of performance of master's duties to the extent required by the Factory Act.

Death—Damages Recoverable Under Employers' Liability Act Limited to Prospective Earnings.

10. Recovery for death under Employers' Liability Act, Section 4, is limited to the net amount which decedent would probably have saved from his earnings considering his age, health, ability, habits of industry, and mental and physical skill, so far as affecting his capacity for earning or rendering services or accumulating.

[As to mode of estimating value of life, see note in 12 Am. St. Rep. 379.]

Evidence—Rules of Employer not Printed may be Shown by Parol.

11. Anyone knowing the rules regulating employment and duties of operatives in a factory may testify thereto, they not being written or printed, and the law not requiring that they should be.

From Multnomah: ROBERT G. MORROW, Judge.

In Banc.

The plaintiff is the widow of George Kuntz, who was employed by the defendant as an off-bearer for a rip-saw in its factory. This machine was situated in what is designated in the pleadings as the dimension-room. In a room above was another saw known as the trimmer-saw. This latter machine was operated by means of a belt running from a small pulley on it down to a large pulley about thirty-two inches in diameter by ten inches face, mounted on a line shaft about forty-two inches above the floor in the dimension-room. This pulley was situated about ten feet from where the decedent stood in doing his work for which the pleadings admit he was employed. It is alleged in substance in the complaint that the shafting for pulleys involved was out of alignment, by reason of which the belt came off the pulley, frequently; that there was no guard over the pulley, nor belt shifting device; that the defendant had failed to provide any rules for the conduct of the work or any system of signals whereby the trimmer-saw operator could notify the engineer in charge of the motive power of the mill to slow down the ma-

chinery while the belt was being replaced; that the defendant was careless in failing to warn the decedent about the danger incident to the work of putting on the belt, and generally that the defendant failed to use every device, care and precaution which was practicable to be used for the protection of the life and limb of its employees. It is said also in the complaint that it was customary for the trimmer operator on the floor above, whenever the belt came off the pulley, to direct the decedent to replace it, all of which was known to and acquiesced in by the defendant; that on June 19, 1917, while the decedent was working as such off-bearer, the belt came off and the trimmer operator called down to him to put it on again, in pursuance of which he attempted to do so and without having any means for the purpose, took a stick with which he attempted to adjust it, but by reason of the great speed with which the pulley was running and because it was not guarded and there was no belt shifting device, the stick was caught by the pulley and hurled with great force against his chest, resulting almost immediately in his death.

It is charged that the defendant had elected not to conform to the legislation known as the Workmen's Compensation Act, or to avail itself of the benefits thereunder. After alleging the expectancy of the decedent and his earning capacity, the complaint concludes with an allegation of the damages suffered by the plaintiff.

The answer admits the capacity in which the decedent was employed and that he died as the result of injuries received while so employed. After further admitting that the defendant had elected not to conform to the workmen's compensation law, the other allegations of the complaint are denied. Affirmatively

the answer imputes the injuries and the death of Kuntz solely to his own carelessness and negligence in that he violated the rules of the defendant by leaving his place of work and going beyond the contract and scope of his employment for the purpose of replacing the belt, for which latter service he was not hired or employed. Further, his death is imputed to his contributory negligence and it is alleged, too, that his demise was, so far as the defendant is concerned, wholly accidental, unavoidable, unforeseen and not preventable by the exercise of the lawful degree of care.

It is further stated:

“That prior to the commencement of the above action the plaintiff commenced an action in the above-entitled court against this defendant praying for the same amount claimed in this action.”

Under this head the answer goes on to say that in the preceding action a judgment of nonsuit was granted against the plaintiff and in favor of the defendant, whereupon the plaintiff filed a motion for a new trial, which was allowed February 19, 1918, and the defendant appealed to the Supreme Court of this state, which appeal is still pending. Finally, in this defense it is said:

“That said action involves the same parties and the same subject matter and until the same has been abated or dismissed or otherwise disposed of this action is not maintainable and constitutes a bar to the present action.”

The new matter of the answer is traversed by the reply and respecting the plea of *lis pendens* the plaintiff, finally pleading, alleges:

“The truth and fact to be that said cause was partly tried, that a nonsuit in favor of defendant was erroneously granted by the court, contrary to the law gov-

erning said cause, that thereafter said nonsuit was set aside but that the order setting the same aside was made and entered after the time allowed by law; that from said order the defendant appealed to the Supreme Court, that said appeal was only taken for the purpose of delay and for the further purpose of keeping the plaintiff out of her just rights and not for the purpose of determining any legal rights of the defendant, and that said appeal is wholly void by reason that no appeal lies from a void order; that no action is now pending between the parties to this litigation except this action, that the former action has been wholly disposed of."

The Circuit Court denied the motion for nonsuit at the close of the plaintiff's case and the trial resulted in a verdict and judgment in favor of the plaintiff, from which the defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Senn, Ekwall & Recken*, with an oral argument by *Mr. F. S. Senn*.

For respondent there was a brief over the names of *Mr. Chester A. Sheppard* and *Mr. John E. Owens*, with an oral argument by *Mr. Sheppard*.

BURNETT, J.—1-4. In respect to the plea of *lis pendens*, both the answer and the reply are affected by a common error, that of pleading conclusions of law rather than the facts from which a court might be enabled to reach the desired deduction. It is not sufficient in the answer to state merely that the former action was for the same amount. The identity of causes of action is not established by equality of the amounts demanded. Neither is it more than a conclusion of law to say that the pending action involves the

same parties and the same subject matter. The issues in the former case should be recited with sufficient clarity so that the court might be enabled to determine that the two actions were identical. In the reply it is not enough to say that the order granting a new trial was entered after the time allowed by law. The pleading does not inform us of the date of filing the motion for a new trial or of granting the same. Hence we are unable to discern from the reply whether the order was entered out of time or not. The plea of *lis pendens*, therefore, does not state facts sufficient to constitute a defense and it is enough to say in that regard that it can avail the defendant nothing here. At the argument, however, it was conceded that the order allowing the new trial was made sixty-one days after the motion was filed. Treating of such a motion, Section 175, L. O. L., as amended by the act of February 18, 1911, provides that:

“The motion shall be heard and determined during the term, unless the court continue the same for advisement, or want of time to hear it, but said motion shall be heard and determined by the court within sixty days from the time of the entry of judgment, and not thereafter, and if not so heard and determined within said time, the said motion shall be conclusively taken and deemed as denied.”

This statutory disposition of such a motion is imperative and leaves no room for any other construction than that the former action ended in a judgment for nonsuit, which does not bar another action for the same cause: Section 184, L. O. L.

5. The principal contention of the defendant, as stated in the briefs, is that as the decedent, having left his regular place of work as off-bearer while undertaking to put on the belt, was a mere volunteer and was

acting beyond the scope of his employment, a nonsuit was proper or a directed verdict should have been granted. Under the initiative act of November 8, 1910, known as the Employers' Liability Act, all owners, contractors, subcontractors, corporations or individuals whatsoever engaged in the operation of any machinery are charged with the duty of protecting the same and covering it securely to the fullest extent that the proper operation thereof permits, and the act requires that all machinery other than that operated by hand power, whenever necessary for the safety of employees in or about the same or for the safety of the general public, shall be provided with a system of communication by means of signals, so that at all times there may be communication between the employees and the operators of the motive power. The first section of the act closes with this provision:

"And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Section 4 of the act as it stood when the occurrences narrated in the pleadings happened reads thus:

"If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother or father, as the case may be, shall have a right of action without

any limit as to the amount of damages which may be awarded."

Section 6 declares that:

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

It was in evidence that when the belt came off, anybody who happened to be there put it on and one witness said, "I guess everybody around the mill has put it on." Another witness said that the decedent had put on the belt. So far as that act being within the scope of his employment is concerned, the case is governed in principle by *Beaver v. Mason-Ehrman & Co.*, 73 Or. 36 (143 Pac. 1000, 7 N. C. C. A. 876). In that case the plaintiff's decedent was a boy who was employed as a messenger in and about a seven-story building occupied by the defendant firm. He received his fatal injuries while he was attempting to operate an elevator. There was some evidence to the effect that he had been seen by other employees running the elevator before the accident. There was other testimony on behalf of the defendant that those in authority over him had warned him not to meddle with the elevator and he had been told to keep away from it. But it was held that the court could not declare as a matter of law that it was not within the measure of his duties, Mr. Justice RAMSEY saying:

"Under the evidence it was a proper question for the determination of the jury, as it is shown that he did operate it frequently and the defendant's officers may have had knowledge thereof and acquiesced therein. Under the issues and the evidence it was for the jury and not the court to determine that question. We cannot say that there was no evidence to support the contention that they allowed him to operate it."

By analogy, the same principle is taught in *Wheeler v. Nehalem Timber Co.*, 79 Or. 506 (155 Pac. 1188). Some loggers in the employ of the defendant were working in the woods during cold weather. Some of them had built a fire in a decayed stump for the purpose of warming themselves. No rule had been established respecting that practice, but the foreman knew of it and did not forbid it. While the plaintiff was engaged in his labor this burning stump fell upon him and injured him. The holding was that there was enough evidence to present to the jury the question of whether or not the kindling of the fire promoted the employer's business. See, also, *Stool v. Southern Pacific Co.*, 88 Or. 350 (172 Pac. 101), in which a section-hand was held to be within the scope of his employment while walking on the track a few minutes before the time to begin work and proceeding toward the place where he was at work the day before and where he expected to continue his labors.

6. It is not necessary, however, to rest the decision of this case exclusively on the proposition that the act of the decedent in going from his place as an off-bearer for the rip-saw to another point in the same room to put on the belt was within the scope of his employment. The Employers' Liability Act requires that the owners of such machinery shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the machine. That duty is extended not to any particular life or limb, but generally, the only limitation being the necessity for preserving the efficiency of the machine. It has often been held that a violation of a statutory duty of this kind is negligence *per se*. The

section giving a cause of action to the widow of a decedent bases that right upon the general fact that:

“If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable. * * ”

It is not the life of any particular employee whether careful or negligent which is to be protected; but the language is general and comprehensive so that if there shall be any loss of life the action will lie. Still further, it is said that the contributory negligence of the individual injured shall not be a defense, but may be taken into account by a jury in fixing the amount of damage. The most that can be said of the act of Kuntz in leaving his station and going to put on the belt is that it was negligent on his part, and this is no defense but only goes to lessen the amount of recovery for the accident. The defendant gave evidence in substance that it had provided a millwright whose duty it was to do that kind of work. Let us suppose that the millwright had gone to put the belt in position, had operated like Kuntz did and had been injured like he was. A cause of action would have at once arisen in favor of the millwright's widow, for the reason that the neglect of the defendant to comply with the statute, if proved, was negligence *per se* and entered into the injury as an ingredient thereof. The difference between the supposed case and the instant one is only in degree. In each case all that is left to the defendant shown to be guilty of a violation of the statute fastening upon it the charge of negligence *per se* is to lessen the amount of recovery by showing negligence of the decedent. The principle is the same in both cases.

The old rule was that an employee assumed the ordinary risks of his employment and that if his own negligence contributed to his injury the law would not apportion the fault, but would deny a recovery. The obvious purpose of the employers' liability law was to change this rule and make a more equitable adjustment of the casualties of hazardous occupations. In order to escape liability the defendant must be without fault and the fair adjustment of responsibility if he is negligent is worked out by reducing the amount of recovery in proportion to the negligence of the injured party. The greater his negligence, the more should the recovery be reduced, even to a nominal sum if his fault should require it; but that is a question for the jury to determine.

7, 8. Complaint is made that the court was in error in allowing a witness to testify that he had inspected the factory of the defendant in November preceding the occurrence of the accident in June and that there were no rules or regulations regarding the adjustment of the belt in question. The objection was that it was not part of the *res gestae*, and too remote. It was indeed not part of the *res gestae*, but it was permissible to prove that there were no rules at that time and that the same condition continued up to and including the time of the accident. The objection of remoteness goes rather to the weight of the testimony than to its competency. The trial court refused an offer of the defendant to show that at the time Kuntz started to put on the belt he was warned by the man in charge of the rip-saw, with whom he worked, not to put on the belt but to leave it alone. In this the court was in error. At least it was competent to show that he went there in spite of the remonstrance of his fellow-workmen, as it would indicate a recklessness or want

of care on his part, tending to support the charge that he was negligent, with a view of reducing the claim for damages.

9. The defendant sought to have admitted in evidence a certificate of inspection given it by the state labor commissioner, in force and effect for one year after November 9, 1916, to the effect that in the judgment of the commissioner the factory where the accident happened conformed to what is known as the Factory Act, filed in the office of the Secretary of State February 25, 1907. That act requires the owner or individual operating a factory, mill or workshop where machinery is used, to provide and maintain in use belt-shifters or other mechanical contrivances for the purpose of throwing on or off belts or pulleys while running, where the same are practicable with due regard to the nature and purpose of said belts and the danger to employees therefrom, and further requires reasonable safeguards for gearing, belting, shafting, couplings and machinery of other or similar descriptions which it is practicable to guard and with which the employees are liable to come in contact while in the performance of their duties, together with other precautions largely in the same line with the Employers' Liability Act: Section 5040, L. O. L. It is required in Section 5046, L. O. L., that:

"Whenever upon any examination or re-examination of any factory, mill or workshop, store or building or the machinery or appliances therein, to which the provisions of this act are applicable, the property so examined and the appliances therein conform, in the judgment of the said labor commissioner, to the requirements of this act, he shall thereupon issue to the owner, lessee or operator of such factory, mill or workshop * * a certificate to that effect, and such certi-

cate shall be *prima facie* evidence as long as it continues in force of compliance on the part of the person, firm, corporation or association to whom it is issued, with the provisions of this act."

As indicated by its title, the Factory Act is designed to provide "for the protection and health of employees in factories, mills or workshops where machinery is used," etc. In the title to the Employers' Liability Act we find that it is to provide "for the protection and safety of persons engaged * * about any machinery or in any dangerous occupation," etc. The requirements noted are common to both statutes. "Things equal to the same thing are equal to each other." Consequently, if the certificate mentioned is *prima facie* evidence that, for instance, the owner of a plant has provided reasonable safeguards for the machinery therein under the Factory Act, the same document is *prima facie* evidence of compliance with the same requirement under the employers' liability law. It is true that the latter enactment compels the use of every practicable safety device "without regard to additional cost," but this does not establish any more stringent rule than that imposed by the earlier statute. The limitation stated by the Factory Act is practicability "with due regard to the ordinary use of such machinery and appliances and the dangers to employees therefrom." Cost is not considered as an element in the canon of duty. Its essential ingredients are the use, not cost, of the machinery together with the safety of the operatives. The factory statute, therefore, prescribes a rule of evidence of which the defendant was entitled to avail itself and the court was in error in refusing to receive the certificate: *Ramaswamey v. Hammond Lumber Co.*, 78 Or. 407 (152 Pac. 223).

10. Another assignment of error is that the court was wrong in directing the jury that the plaintiff was entitled to recover such sum of money as would wholly compensate her for the pecuniary loss suffered by her, limited only by the amount asked for in the complaint. The rule established by this court in *McClagherty v. Rogue River Electric Co.*, 73 Or. 135 (140 Pac. 64, 144 Pac. 569), is in substance that the recovery is limited to the net amount which the decedent would probably have saved from his earnings by his skill or bodily labor in his trade or calling, taking into consideration his age, health, ability, habits of industry and mental and physical skill, so far as they affect his capacity for earning money or rendering services to others, or accumulating property. The instruction on that point should have conformed substantially to the rule thus established.

11. The court was right in refusing to grant a non-suit or to direct a verdict for the defendant and in its admission of the evidence respecting the lack of rules and regulations a few months before the occurrence of the accident. Having in mind the new trial to be awarded, it is proper to say that the court ought to have been more liberal in admitting evidence about the rules regulating employment and duties of operatives in the defendant's mill. The law does not require them to be in writing and unless they are written or printed, involving the principle that the document itself is the best evidence of its contents, anyone who knows the rules may testify to what they are. There was error in excluding evidence of the warning given the decedent to stay away from the belt, in not admitting the certificate of the state labor commissioner and in the court's definition of the measure of damages.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HARRIS, J., Concurring Specially.—I agree in all the opinion written by Mr. Justice BURNETT except that portion which relates to the certificate issued by the labor commissioner. I do not concur in all that is said about the certificate although I do assent, on the authority of *Ramaswamy v. Hammond Lumber Co.*, 78 Or. 407, 426 (152 Pac. 223), to the conclusion that the defendant was entitled to introduce the certificate as evidence.

The Factory Inspection Act was adopted by the legislature in 1907 and is codified in Sections 5040 to 5057, L. O. L., inclusive. In 1911 the legal voters of the state exercised the power of the initiative and enacted the Employers' Liability Act: Chapter 3, Laws 1911. The Factory Inspection Act provides for the issuance of a certificate by the labor commissioner and this certificate is, by that statute, declared to be *prima facie* evidence of compliance with the provisions of the act. The Employers' Liability Act makes no provision for the issuance of a certificate.

The Employers' Liability Act is wider in its scope and more exacting in its requirements than is the Factory Inspection Act; and consequently a certificate issued by the labor commissioner under the authority of the Factory Inspection Act is only *prima facie* evidence that the employer has gone as far, in the performance of his duty, as is required by the Factory Inspection Act: 5 Labatt's Master & Servant (2 ed.), 5670. Whenever and wherever the Employers' Liability Act adds to the duty placed upon the employer by the Factory Inspection Act, the certificate is no evidence at all that the employer has performed such

added duty. The certificate is *prima facie* evidence of performance to the extent and only to the extent that the Factory Inspection Act requires performance.

BEAN and JOHNS, JJ., concur.

Argued July 10, affirmed September 30, 1919.

DENNISON v. JOSSI.*

(184 Pac. 269.)

Mortgages—Reinstatement of Mortgage Satisfied by Mistake.

1. When the owner of two mortgages, intending to satisfy one, by mistake satisfies the other mortgage, he is entitled to have the mistake corrected and the mortgage reinstated, unless right of third parties would be prejudiced.

[As to when mortgage will be revived in case of being satisfied by mistake, see note in 5 Am. St. Rep. 703.]

Vendor and Purchaser—Mortgagee Satisfying Mortgage by Mistake has No Remedy Against Innocent Purchaser.

2. The owner of a mortgage who satisfied it by mistake is not entitled to have the mistake corrected and the mortgage reinstated as against the intervening rights of *bona fide* purchasers and encumbrancers.

Vendor and Purchaser—Rights of Bona Fide Purchasers and Encumbrancers Without Notice When Mortgage Erroneously Satisfied.

3. Where the owner of two mortgages through mistake satisfied one which he did not intend to satisfy, and after the satisfaction was indorsed on the record, the premises were disposed of and a subsequent mortgage given, *held*, that the last purchaser and the mortgagee took the same without any constructive notice, so that the mortgagee was not entitled to have the mortgage reinstated, the purchaser and subsequent encumbrancer having no actual notice.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 1.

By mistake John Dennison satisfied a mortgage owned by him, and upon discovery of his mistake

*On right to reinstatement of mortgage which has been released or discharged by mistake, see notes in 58 L. R. A. 788; 26 L. R. A. (N. S.) 816; 28 L. R. A. (N. S.) 825; L. R. A. 1917E, 1055. REPORTER.

brought this suit for the purpose of reinstating and foreclosing the mortgage. There was a decree dismissing the suit and the plaintiff appealed.

On July 31, 1908, Chester A. Sheppard and his wife gave to John Dennison their promissory note for \$750, payable on July 31, 1911, with interest at 8% per annum payable semi-annually; and, to secure the note, they also gave a mortgage on lot 25 in block 1 in Creston, Multnomah County, Oregon. This is the mortgage which Dennison satisfied by mistake and it is this encumbrance which he is seeking to have reinstated and foreclosed.

On the same date, July 31, 1908, Chester A. Sheppard and his wife gave another promissory note to John Dennison for \$750 payable July 31, 1911, with interest at 8% per annum payable semi-annually; and the Sheppards secured this note by executing a mortgage on lot 5 in block 11 in Creston.

Both mortgages were witnessed by the same witnesses, acknowledged before the same notary public and both were presented for record at 4:41 P. M. on July 31, 1908. The instruments themselves are identical in all respects except that one covers lot 25 in block 1 while the other embraces lot 5 in block 11 in Creston and except that the former bears the number 22859, which appears to have been stamped upon it by the recording officer, while the latter is numbered 22858. The mortgage covering lot 5 is wholly recorded on page 474 in book 319 of the mortgage records for Multnomah County. Each page of this book is numbered at the top. Immediately to the right of and a little below page number 474 are the figures 22858, the number given by the recording officer to the mortgage on lot 5. Immediately below the figures 22858 are the words "Sheppard et ux. to Dennison";

and then follows a record of the mortgage on lot 5. Nearly the entire page is required for this instrument although there was enough of the page left to permit the recording of a small portion of the mortgage which relates to lot 25. The record of the mortgage covering lot 25, as in the case of the other mortgage, shows its identification number; for the figures 22859 appear first and then immediately below these figures are the words "Sheppard et ux. to Dennison"; and then follows a record of the mortgage covering lot 25. However, only six lines of this instrument appear on page 474 and the remainder was written on page 475. On the margin of page 475 and next to the record of the mortgage covering lot 25 is a writing signed by John Dennison which reads as follows:

"Full satisfaction of the within mortgage is hereby acknowledged this 30th day of June, 1909."

The mortgage on lot 5 had been paid and Dennison intended to satisfy that encumbrance; but for some reason he made a mistake and signed the writing which purports to satisfy the mortgage on lot 25. No payments, except one payment of interest, had been made on the note which was secured by the mortgage on lot 25. Dennison did not discover his mistake until on or about April 11, 1916, and on that date he caused to be made and he signed entries, one on the margin of page 474 and another on the margin of page 475, to the effect that the writing of June 30, 1909, was intended to apply to lot 5 but by mistake was entered on page 475.

On January 28, 1909, Sheppard and wife deeded lot 25 to J. Martin Pierson and wife; but the conveyance was not recorded until March 14, 1914. The grantors covenanted that they were the owners of the lot and

that the premises "are free from all encumbrances, except a certain mortgage of seven hundred fifty (\$750) dollars drawing 8% interest, dated July 30, 1908, given to John Dennison, which said grantees assume and agree to pay."

By an instrument dated June 3, 1914, and recorded October 9, 1914, J. Martin Pierson and his wife deeded lot 25 to E. L. and C. L. Beadell. The grantors in this instrument covenanted that the property was "free from all encumbrances, except a certain mortgage of seven hundred fifty (\$750) dollars drawing 8% per annum dated July 30, 1908, given to John Dennison which is past due one year and said grantees assume and agree to pay."

The Beadells and their wives transferred lot 25 to Clyde and Ludie McCoy by a deed dated October 6, 1915, and recorded October 9, 1915. This conveyance contains a covenant "that the said premises are free from all encumbrances except a certain mortgage of seven hundred and fifty (\$750) dollars drawing 8% interest per annum dated July 30, 1908." The grantors also agreed to defend against all lawful claims and demands "save and except the above-mentioned mortgage."

By a warranty deed dated December 15, 1915, and recorded on that day the McCoys conveyed lot 25 to Frederick C. Blatch. The grantors covenanted that the property was free from all encumbrances and agreed to defend against the demands of all persons.

By a warranty deed dated December 16, 1915, and recorded December 17, 1915, Frederick C. Blatch conveyed lot 25 to W. B. Baugh. The grantor in this instrument covenanted that the premises were free from all encumbrances "except city liens now bonded."

On December 17, 1915, W. B. Baugh borrowed \$1,000 from W. L. Boise, trustee, and, to secure the note given by him, he executed a mortgage on lot 25. This mortgage was recorded on December 17, 1915, the date of its execution.

By a warranty deed dated March 10, 1916, and recorded March 15, 1916, W. B. Baugh and his wife conveyed lot 25 to Mike Jossi. The grantors covenanted with the grantee in this deed that "the said premises are free from all encumbrances except mortgage of \$1,000, which grantee assumes."

The trial court decided that Boise, as trustee, was an innocent mortgagee without notice and that Jossi was an innocent purchaser without notice.

AFFIRMED.

For appellant there was a brief over the names of *Mr. M. M. Mattheissen, Messrs. Wood, Montague & Hunt* and *Mr. P. P. Dabney*, with an oral argument by *Mr. Mattheissen*.

For respondents, Mike and Margaret Jossi, there was a brief over the names of *Messrs. Christopherson & Matthews* and *Mr. Grant B. Dimick*, with an oral argument by *Mr. Q. L. Matthews*.

For respondent, Whitney L. Boise, there was a brief over the names of *Mr. Frederick V. Holman* and *Mr. John T. McKee*, with an oral argument by *Mr. Holman*.

For respondent, Ethelyn C. Sheppard, there was a brief prepared and presented by *Mr. Chester A. Sheppard*.

HARRIS, J.—The mistake made by Dennison was, either wholly or in part, the result of his own indi-

vidual negligence. It is possible that the recording officer who prepared the entry and attested Dennison's signature to the satisfaction of the mortgage shared in the negligence; but whether he did or not is immaterial as between Dennison and defendants Boise and Jossi. The note which was secured by the mortgage on lot 5 was paid and after it was paid Dennison went to the courthouse for the purpose of satisfying the mortgage which covered lot 5. Dennison testified that he "went in the courthouse and laid down the mortgage" and "the man took the book and he told me where to sign and I signed there." While it is not necessary to decide whether the mortgage which Dennison took to the courthouse was the one covering lot 25 or the one covering lot 5 yet there are a number of circumstances from which it can be argued that the recording officer was shown the mortgage on lot 25. There is an indorsement on the back of the original instrument, covering lot 25, showing that it was recorded on page 474 of volume 319. The whole of the mortgage on lot 5 appears on that page and only a small part of the mortgage on lot 25 is there shown; and hence there is room for the argument that the practiced eye of the recording officer did not, when he turned to page 474, overlook the record of the mortgage on lot 5. If the officer observed that page 474 contained the record of the other mortgage it is possible that he was guided by the number stamped on the back of the instrument and written on the record as well as by the description of the mortgaged property. Dennison was negligent, however, even though he took the mortgage on lot 5 to the courthouse; but he was still more negligent if he showed the recording officer the mortgage on lot 25.

1-3. When the owner of two mortgages intends to satisfy one but by a mistake satisfies the other mortgage he is entitled to have the mistake corrected and the mortgage reinstated unless the rights of third parties will be prejudiced: 27 Cyc. 1433. The same rule that measures the rights of Jossi also determines the rights of Boise. If Jossi was a purchaser for value in good faith and without notice of Dennison's equity then he is entitled to prevail; and so, too, Boise as mortgagee is entitled to protection if he took a mortgage on the lot in good faith and without notice: 19 R. C. L. 409; *Lowry v. Bennett*, 119 Mich. 301 (77 N. W. 935). It is conceded that neither Boise nor Jossi had actual knowledge of the mistake made by Dennison; and, therefore, we must inquire whether these two defendants had constructive knowledge of the plaintiff's equity.

Counsel for the defendants rely, among other precedents, upon *Larzelere v. Starkweather*, 38 Mich. 96, 107, where it is said that—

“There are cases which go very far in extending the doctrine of laches in applying the rule of constructive notice. We think, however, the better and certainly the safer rule to be that a mere want of caution is not sufficient,—not that he had incautiously neglected to make inquiries, but that he had designedly abstained from making inquiry for the very purpose of avoiding knowledge.”

It is not necessary to determine whether the language just quoted should be applied in its full literal meaning. Nor do we find it necessary to discuss the reasoning employed in *Raymond v. Flavel*, 27 Or. 219, 241 (40 Pac. 158); but for the purpose of the controversy presented here it is sufficient to follow the language found in *McDougal v. Lame*, 39 Or. 212, 214 (64

Pac. 864), where it is said in substance that a party is chargeable with notice of an outstanding equity held by a third person if, in the same circumstances, an ordinarily prudent man would have made inquiry and if such inquiry upon being prosecuted with ordinary diligence would have resulted in knowledge of the equity: *Jennings v. Lentz*, 50 Or. 484 (93 Pac. 327, 29 L. R. A. (N. S.) 584). None of the precedents express the rule in language more favorable to the plaintiff than does the opinion in *McDougal v. Lame*; and yet if the rights of these litigants are measured by this rule of ordinary diligence, the test that is the most favorable to the plaintiff, it will nevertheless be found that Dennison cannot prevail.

Before making the mortgage Boise examined an abstract showing the condition of the record title. This abstract included the mortgage from the Sheppards to Dennison and the satisfaction of that mortgage, as it was recorded on June 30, 1909, the deed from the Sheppards to the Piersons, and the conveyance from the Piersons to the Beadells. The deed from Blatch to Baugh did not appear in the abstract but the original instrument was shown to Boise. The record is not entirely clear as to whether or not the abstract submitted to Boise contained an account of the deed from the Beadells to the McCoys or an account of the deed from the McCoys to Blatch; but it is certain from the evidence that Boise either saw a recital of those two deeds in the abstract or was shown the original instruments. Boise was acting as trustee for a Mrs. Taylor. One Anderson was negotiating with Mrs. Taylor for a loan and "he brought her to" Boise's office. Boise had noticed the references to the Dennison mortgage in the respective deeds given to the Piersons, the Beadells and the McCoys, as well as

the satisfaction of the mortgage. Boise testified that when Anderson came to his office with Mrs. Taylor:

"I says, 'I don't understand about these reservations here.' He says, 'Those mortgages are satisfied,' he says, 'I am an abstracter and I saw it myself.' I says, 'I wish you would go back to the abstracter and get a note about that.' And so he did and he came back with a note from the abstracter showing that the mortgage was satisfied, and he assured me that he had seen it on the record, so I believed him."

In the course of the conversation between Anderson and Boise the former explained to the latter "that this was probably some real estate man drawing the deed that had copied what had been in somebody's else deed and that was the reason of it."

It is true that as said in *Talbot v. Joseph*, 79 Or. 308, 317 (155 Pac. 184, 187), "the record is the standard which the law has erected to decide such questions, and he is bound by the terms of the conveyance as recorded, but no further"; and consequently any defect in the abstract could not be of avail to Boise. The abstract stated the whole truth as it was at that time told by the record and when Boise completed his examination of the abstract he knew as much as he would have learned if he had gone to the records and read all the entries affecting lot 25. It is also true that if he had gone to the courthouse he might possibly have seen the record of the mortgage relating to lot 5; and yet he was under no obligation to examine into the title of lot 5. Nor would it necessarily follow that Boise would be chargeable with bad faith if he had made no other inquiries than those actually made by him, even though he had gone to the courthouse and while investigating the title of lot 25 casually noticed the record of the mortgage on lot 5. Boise did observe that two deeds

made after the satisfaction of the mortgage contained reservations relating to the Dennison mortgage. Boise is a lawyer with many years of experience; and, furthermore, the terms of his trust required him to loan on first mortgages. Boise assured himself that the record in truth contained a satisfaction of the mortgage and this plus his knowledge of the existence of the two deeds containing covenants that the premises were free from all encumbrances, together with the statement made by Anderson justified him as a reasonably prudent business man in making the loan.

The title to lot 25 was examined by "Mr. Schmauch and Mr. McKenzie" for the defendant Jossi. McKenzie & Company conducted a fire insurance, money loaning and real estate business in Portland, the city in which all the transactions involved in this litigation occurred; and W. J. Schmauch was an employee of McKenzie & Company and as such employee "just handled the real estate." An abstract containing an accurate account of the entire record concerning lot 25 was submitted to Mr. McKenzie who examined it. He noticed that Mr. Boise had made a loan of \$1,000 and after making the remark that "if Mr. Boise passes on it it must be all right" he sent Schmauch to see Mr. Boise. Schmauch says that he asked Boise "if he had found the title O. K. and made the loan and he said: yes." We think that Jossi through his representatives exercised all the care that could be expected of an ordinarily prudent man.

The decree is affirmed.

AFFIRMED.

McBRIDE, C. J., and BURNETT and BENSON, JJ.,
concur.

Argued July 8, affirmed September 9, rehearing denied October 7, 1919.

WELCH v. JOHNSON.

(183 Pac. 776; 184 Pac. 280.)

Pleading—Complaint, Though Demurrable, Sufficient Against Objection not Raised Below.

1. A complaint, in a suit to reform a deed by striking out a purported obligation of purchaser to pay a note and mortgage, and relieve him from liability to a deficiency judgment (Section 426, L. O. L.), although subject to demurrer for not giving a more specific explanation of plaintiff's own conduct to show that the mistake did not arise from his own gross negligence, *held* sufficient as against an objection thereto urged for the first time upon appeal, as every reasonable inference should be given in favor of the complaint that can be drawn therefrom.

Pleading—New Matter in Substance Amounting Merely to Denials Requires No Reply.

2. Where following the words, "This defendant admits and alleges," the answer makes affirmative statements which in form are new matter, but in substance amount merely to denials, a reply is unnecessary.

[As to matters presumptively within knowledge of defendant in general forming limitation in use of denial, see note in 133 Am. St. Rep. 109.]

Appeal and Error—Finding of Lower Court will not be Disturbed.

3. In a suit to reform a deed, finding of trial judge, who heard and saw the witnesses, that there was a mistake should not be disturbed, the contrary evidence consisting only of a few suspicious circumstances.

Mortgages—Mortgagee Cannot Urge Assumption Clause Inserted by Mistake.

4. Mortgagee cannot avail himself of assumption clause inserted through mistake or oversight of the scrivener, and without the knowledge or consent of either grantor or grantee.

Reformation of Instruments—When Authorized for Mistake of Stenographer of Party.

5. Where both plaintiff, seeking to reform a deed by striking out a clause assuming a mortgage made by his grantors to mortgagee, and his grantors, agree that the clause was inserted by mistake, and no element of estoppel being available to the mortgagee, who was not induced by the assumption provision to change his position to his disadvantage, *held*, that purchaser was not guilty of such negligence in failing to read the deed prepared by his own stenographer, and executed and recorded by his grantors, as would prevent reformation of the deed.

Appeal and Error—Reformation of Instruments—When Defect in Necessary Parties Defendant is Immaterial.

6. In a suit to reform a deed by striking out the clause obligating purchaser to pay a note and mortgage, purchaser's grantors, as well as their mortgagees, should be made parties, but, on mortgagee's appeal from a judgment for purchaser, the cause need not be remanded for failure to make grantors parties, where they, as witnesses for plaintiff, testified that he did not agree to assume the note and mortgage, which estops their denial thereof.

ON PETITION FOR REHEARING.

Attorney and Client—Implied Authority of Attorney to Admit Away Client's Case.

7. A general attorney had no implied authority, merely from his employment, to bind his client by an admission there was no mistake in the terms and conditions of the conveyance to the client, in the absence of pending litigation in which he was appearing as attorney of record.

Evidence—Admission in Brief Binding Only as to Parties to Litigation.

8. An allegation in a brief could bind only the parties to the litigation, and not another party for whom one of the attorneys who prepared the brief was counsel.

Reformation of Instruments—Preparation of Deed in Office of Plaintiff's Attorney No Defense.

9. Though the deed which plaintiff sues to correct was prepared in the office of his attorney, it was not necessarily any the less a mistake to include the disputed clause.

Reformation of Instruments—Preparation of Deed in Office of Plaintiff's Attorney as Showing Negligence.

10. That the deed whose reformation is sought was prepared in the office of plaintiff's attorney is properly considered on the point that to be relieved from mistake it must appear the mistake was not due to party's negligence.

Reformation of Instruments—Negligence Preventing Relief Against Mistake must be Violation of Duty.

11. The negligence which would prevent relief from mistake in a deed by reformation of the instrument must be such as amounts to violation of a positive duty owing the other party.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

The object of this litigation is to determine whether a deed, delivered to A. Welch, should be reformed by striking out a provision which purports to obligate Welch to pay a note and mortgage held by John R.

Johnson. On October 28, 1911, John R. Johnson sold and conveyed a tract of orchard land in the Hood River section to Lillie J. Scott Ricord for the agreed price of \$13,500. Lillie J. Scott Ricord paid \$3,000 in cash and she and her husband gave their note to Johnson for \$10,500 for the balance of the purchase price. The note was payable five years after October 28, 1911. The Ricords secured the note by giving a mortgage on the land purchased from Johnson. On November 1, 1912, the Ricords conveyed the land to Katherine Vreeland. The deed received by Katherine Vreeland was made subject to the mortgage held by Johnson and also contained these words:

"The payment of which said promissory note and the release of the said mortgage, executed to secure the same, is hereby assumed by the said Katherine Vreeland."

On November 7, 1912, Katherine Vreeland and her husband George Vreeland deeded the land to her father A. Welch; and this deed contained the following provision:

"The payment of which said promissory note, and the release of said mortgage executed to secure the same is hereby assumed by the said A. Welch, the grantee hereunder; and that we will, and our heirs, executors and administrators shall forever warrant and defend the same from the lawful claims and demands of all persons whomsoever, save and except as to the said mortgage and promissory note which the said A. Welch hereby assumes and agrees to pay."

On February 3, 1914, Welch conveyed the property to the Pacific Land Company, a corporation. The Pacific Land Company quit the property, and afterwards on March 15, 1915, because of the fact that the fruit trees and the strawberry plants needed care and

attention, Johnson entered upon the premises and since that time has been in possession.

Claiming that the assumption clause in the deed from the Vreelands to Welch made the latter liable for the payment of the note, Johnson began an action against Welch for the recovery of \$10,500, the principal due on the note, together with accrued interest, and \$1,000 attorney's fees. Welch answered the complaint in the action and then commenced this suit by filing a complaint in the nature of a cross-bill. A second amended complaint was afterwards filed and this pleading contains five alleged causes of suit. In the first cause of suit the plaintiff avers that negotiations between Welch and the Vreelands resulted in an agreement to the effect that the Vreelands were to convey to Welch their equity in the property and that Welch should take the premises subject to the mortgage; that there was never any understanding or agreement that Welch was to assume or pay the note and mortgage; that in the preparation of the deed and through the mistake of the scrivener and without the knowledge or consent of the Vreelands or of Welch the assumption clause was inserted in the deed; that Welch did not read or know the contents of the deed and that neither the Vreelands nor Welch had any knowledge of the assumption clause being in the deed until about January 1, 1917; that it was not the purpose or intent of the Vreelands to insert the assumption clause in the conveyance and that it was not the purpose or intent of Welch to accept a deed containing an assumption clause.

In the second cause of suit the plaintiff avers that Johnson commenced his suit against the Pacific Land Company, as the sole defendant, for the foreclosure of the note and mortgage and that on December 5, 1916,

entered upon the suit terminated in a stipulated and final decree against the land for the amount of the note; and that because of the rendition of that decree Johnson is estopped to prosecute the action at law against Welch.

The third cause of suit contains a recital of the prosecution of the foreclosure suit to a final decree and an allegation that when Johnson elected to prosecute the suit in foreclosure his act constituted an election of remedies and deprived him of the right subsequently to maintain the action at law.

The fourth cause of suit does no more than to assert that:

"The sole purpose and intent of the commencement and prosecution of such action at law is to enforce a personal liability on the said recitals in the deed against this plaintiff, and to avoid and nullify the force and effect of" Section 426, L. O. L.

The fifth cause of suit is to the effect that Johnson failed to issue an execution on the decree obtained in the foreclosure suit and that therefore he ought not to be allowed to prosecute the action at law until the mortgaged premises are first sold on execution.

Johnson demurred to the second, third, fourth and fifth causes of suit. The demurrer was sustained; and then Johnson filed his answer to the first cause of suit. No reply was filed by Welch.

Process was not served upon Katherine Vreeland or George Vreeland; nor did they appear in the suit except as witnesses for Welch. Johnson was the only person upon whom summons was served and he alone answered. This suit was tried upon the issues made by the first cause of suit and the answer filed by Johnson. The trial resulted in a decree striking out the provision concerning the assumption of the mortgage. Johnson appealed; but Welch did not appeal from the

order sustaining the demurrer to the second, third, fourth and fifth causes of suit. **AFFIRMED.**

For appellant there was a brief over the names of *Messrs. Huntington & Wilson* and *Mr. Ernest C. Smith*, with an oral argument by *Mr. Smith*.

For respondent there was a brief over the names of *Mr. W. A. Robbins* and *Mr. Charles A. Johns*, with an oral argument by *Mr. Robbins*.

HARRIS, J.—1. The appellant contends that the allegations in the first cause of suit do not comply with the rule that the complaint, in cases of this kind, should distinctly show what was the original agreement of the parties, and should point out with clearness and precision wherein there was a mistake, and should show that the mistake did not arise from the gross negligence of the plaintiff: *Lewis v. Lewis*, 5 Or. 170, 177. The complaint does distinctly show what was the original agreement and it also points out precisely wherein there was a mistake. A demurrer to the first cause of suit might have required the plaintiff to give a more specific explanation of his own conduct in order sufficiently to show that the mistake did not arise from his own gross negligence. There is not, however, a complete absence of allegations concerning the lack of negligence on the part of the plaintiff, and at the most the only criticism that can be made of the averments in the complaint is that it contains a defective statement of a good cause of suit; and consequently when the objection is for the first time urged on the hearing in this court "every reasonable inference should be given in favor of the complaint that can be drawn therefrom": *Hyland v. Hyland*, 19 Or. 51, 58 (23 Pac.

811, 814); *Osborn v. Ketchum*, 25 Or. 352, 357 (35 Pac. 972).

2. It is argued that by failing to reply the plaintiff admitted the appellant's claim. Following the words "this defendant admits and alleges" are affirmative statements which in form are new matter but in substance amount merely to denials; and hence a reply was not necessary: *Kabat v. Moore*, 48 Or. 191, 195 (85 Pac. 506); 31 Cyc. 244.

3. The plaintiff maintained an office in Portland. Katherine Vreeland, the daughter of plaintiff, and George Vreeland had been married in July, 1911, and we infer from the record that they lived in or near Hood River. Welch owned an "equity" in a tract of land in the Hood River valley. Soon after the Vreelands purchased the Johnson land they expressed a desire to secure the tract in which Welch owned an "equity"; and according to the testimony of Welch "they suggested they would like to turn in their equity in this place, and as she was my daughter I told her I would take that equity, the equity in the piece of property in the Hood River orchard lands for the piece they desired." In the language of George Vreeland, the parties "just switched equities." A. Welch, George Vreeland and Katherine Vreeland all testified in positive terms that they agreed to exchange equities and that there was no agreement that Welch should assume the payment of the note and mortgage held by Johnson. Welch and the Vreelands were the only persons who had actual knowledge of the terms of the agreement. No witnesses testified that Welch agreed to pay the note or to procure a release of the mortgage. The only evidence contradicting the story told by Welch and the Vreelands consists of alleged suspicious circumstances including the relationship between

Welch and the Vreelands, the assumption clause in the deed from Welch to the Pacific Land Company, and the like. It must be remembered that this is not a case where the grantee is asserting and the grantors are denying that there was a mistake; but here not only the grantee but also the grantors are unreservedly agreed that a mistake was made in the preparation of the deed. The fact that all the persons who knew about the terms of the agreement testified that there was a mistake made in the preparation of the deed, and there was no evidence to the contrary except a few suspicious circumstances, and the fact that the trial judge saw and heard the witnesses, and on that account was in a better position to pass upon the credibility of those witnesses, present a situation where the findings of the trial judge are peculiarly entitled to respect; and we therefore conclude that the findings of the trial judge concerning the fact of mistake should remain undisturbed: *Tucker v. Kirkpatrick*, 86 Or. 677, 679 (169 Pac. 117); *Rowe v. Freeman*, 89 Or. 428, 435 (172 Pac. 508, 174 Pac. 727).

4. The deed which the plaintiff seeks to have reformed was prepared in his office by his stenographer. Welch testified that when the Vreelands said that "they wanted the other place" he "told them all right. They said fix up the deed and send up to them." Continuing his testimony Welch stated, "I had my stenographer prepare a deed for an equity in a certain piece of property. It was sent up there and signed and put on record in Hood River County." When asked whether the clauses concerning the assumption of the mortgage were inserted in the deed by his authority or with his knowledge he answered: "They were not. They were inserted there by copying a deed."

Although Welch stated that he had no recollection of having seen the deed from the Ricords to Katherine Vreeland, nevertheless if the presence of the assumption clause in the deed to Welch is to be accounted for by saying that it was "inserted there by copying a deed," the reasonable inference is that the stenographer had the deed which the Ricords gave to Katherine Vreeland. At any rate the testimony of Welch is to the effect that the paper was prepared by his stenographer upon his instruction to "prepare a deed for an equity in a certain piece of property," and presumably the stenographer had in her possession and copied from the deed which the Ricords had made. After the paper had been prepared by the stenographer it was forwarded to the Vreelands at Hood River and they appeared before a notary public on November 7, 1912, and signed and acknowledged the instrument. George Vreeland caused the deed to be recorded on November 9, 1912, and at some subsequent time he returned it to Welch. On December 28, 1916, Welch received a letter from the attorney for Johnson, advising him that Johnson had obtained a decree against the Pacific Land Company "foreclosing the mortgage on the property [describing it] which together with the note you assumed and agreed to pay in the deed given to you by your daughter, * * on November 7, 1912," and saying also that "you are personally responsible for the payment of this claim in full" and "that Mr. Johnson looks to you for payment of this indebtedness." According to the testimony of Welch he did not know of the existence of the assumption provision in the deed prior to the receipt of that letter. George Vreeland did not know, when he signed the deed, that the document contained the assumption provision; and Katherine Vreeland said in substance

that she supposed that the deed merely transferred the equity. Welch did not ask for or receive an abstract of title.

It is not surprising that Welch did not ask for an abstract or that the Vreelands did not read or notice the assumption provision in the deed signed by them because in the language of George Vreeland "it was a family agreement." If, as the trial court expressly found, the assumption clause was inserted in the paper "by and through a mistake or oversight of the scrivener, and without the knowledge or consent of either the grantor or grantee," Welch is entitled to a reformation of the deed and Johnson cannot avail himself of the assumption clause: *Bradshaw v. Provident Trust Co.*, 81 Or. 55, 62 (158 Pac. 274); *Lloyd v. Lowe* (Colo.), 165 Pac. 609 (L. R. A. 1918A, 999); *Parchen v. Chessman*, 53 Mont. 430 (164 Pac. 531).

5. The appellant argues that Welch was negligent and on that account cannot ask for a reformation of the deed. It is true that, stated in broad terms, the rule is that equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence (2 Pom. Eq. Juris. (3 ed.), § 839); and yet as pointed out by Professor Pomeroy in his legal classic it is not correct to say that a mistake resulting from the complaining party's own negligence will never be relieved, but—

"It would be more accurate to say that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a court of equity will not interpose its relief; but even with this more guarded mode of statement, each instance of negligence must depend to a great extent upon its own circumstances. It is not every negligence that will

stay the hand of the court. The conclusion from the best authorities seems to be, that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby. In addition to the two foregoing requisites, it has been said that equity would never give any relief from a mistake, if the party could by reasonable diligence have ascertained the real facts; nor where the means of information are open to both parties and no confidence is reposed; nor unless the other party was under some obligation to disclose the facts known to himself, and concealed them. A moment's reflection will clearly show that these rules cannot possibly apply to all instances of mistake, and furnish the prerequisites for all species of relief. Their operation is, indeed, quite narrow; it is confined to the single relief of cancellation, and even then it is restricted to certain special kinds of agreements": 2 Pom. Eq. Juris. (3 ed.), § 856.

The principle discussed by Professor Pomeroy was recognized and approved in *Howard v. Tettelbaum*, 61 Or. 144, 149 (120 Pac. 373), where it is said:

"Negligence, in order to bar equitable relief, in case of mutual mistake, clearly established, must be so gross and inexcusable as to amount to a positive violation of a legal duty on the part of the complaining party."

See, also: 34 Cyc. 949.

But, repeating the language of Professor Pomeroy, "each instance of negligence must depend to a great extent upon its own circumstances." To the same effect are: *Powell v. Heisler*, 16 Or. 412, 416 (19 Pac. 109); *Farwell v. Home Ins. Co.*, 136 Fed. 93, 98 (68 C. C. A. 557); *Shields v. Mongollon Exploration Co.*, 137 Fed. 539, 550 (70 C. C. A. 123). Nor is the failure of a complainant to read an instrument conclusive evi-

dence, as a matter of law, that the mistake was due to his negligence: *West v. Suda*, 69 Conn. 60, 62 (36 Atl. 1015); *Hitchins v. Pettingill*, 58 N. H. 3; *Bradshaw v. Provident Trust Co.*, 81 Or. 55, 59 (158 Pac. 274); *Lloyd v. Lowe* (Colo.), 165 Pac. 609, 610 (L. R. A. 1918A, 999); 6 Pom. Eq. Juris., § 680. See, also: *Albany City Savings Inst. v. Burdick*, 87 N. Y. 40; *Story v. Gammell*, 68 Neb. 709 (94 N. W. 982); *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273 (32 South. 887).

The record does not present any element of estoppel as between Johnson and Welch. If instead of being the mortgagee Johnson were an assignee of the mortgagee, and had purchased the mortgage after the delivery of the deed to Welch on the faith of the added security afforded by the assumption clause, or, if Johnson had changed his position to his disadvantage by reason of the assumption provision in the deed to Welch, quite a different case would confront us: *International Mortgage Bank v. Matthews*, 92 Wash. 180 (158 Pac. 991). Johnson paid nothing on account of the assumption clause; he neither did nor omitted to do any act on account of it; and, so far as he is concerned and for all practical purposes, any advantages reaped from it by him are gratuitous. We conclude from the circumstances disclosed by the record, and especially in view of the fact that the grantors and grantee named in the deed agree that there was a mistake as alleged by the complainant and in view of the further fact that there is no element of estoppel available to Johnson, that Welch was not guilty of such negligence as will prevent a reformation of the deed: *Stone v. Moody*, 41 Wash. 680 (84 Pac. 617, 85 Pac. 346, 5 L. R. A. (N. S.) 799).

6. The Vreelands had, by the assumption clause in the deed from the Ricords, obligated themselves to pay

the note and mortgage; and they were therefore vitally interested in any change that might be made in the deed to Welch: *Stover v. Tompkins*, 34 Neb. 465 (51 N. W. 1040).

The Vreelands were necessary parties and ought to have been served with summons and complaint so that any decree which might be rendered would bind them as well as Johnson and Welch. All the parties to a deed who are affected immediately or consequentially by a mistake should be made parties as they are entitled to be heard upon any matter that might affect their rights under the decree: *Center Creek Water & Irr. Co. v. Lindsay*, 21 Utah, 192 (60 Pac. 559); *First National Bank v. Fessler*, 84 N. J. Eq. 166 (92 Atl. 914); *Taylor v. Holmes* (C. C.), 14 Fed. 498, 514; *Cole v. Fickett*, 95 Me. 265, 269 (49 Atl. 1066); *Hellman v. Schneider*, 75 Ill. 422, 425; *De Groot v. Wright*, 9 N. J. Eq. 55, 58; *Oliver v. Clifton*, 59 Ark. 187, 190 (26 S. W. 817); *Bonvillain v. Bodenheimer*, 117 La. 794, 815 (42 South. 273).

The facts here are unlike the facts in *Beasley v. Shively*, 20 Or. 508 (26 Pac. 846), and hence we would not be justified here in dismissing the suit as was done there. Nor need we remand the cause with general directions or with special directions like those given in *Mangin v. Kellogg*, 22 Ida. 137 (124 Pac. 651, 653). Katherine Vreeland and George Vreeland appeared as witnesses for Welch and as such witnesses testified that Welch did not agree to assume the note and mortgage and that the assumption provision was inserted in the deed to Welch through a mistake. This testimony, given by the Vreelands, estops them from denying Welch's right to a reformation of the deed and dispenses with the necessity of remanding the cause: *Vial v. Norwich Fire Ins. Society*, 172 Ill. App. 134, 140;

affirmed in 257 Ill. 355 (100 N. E. 929, Ann. Cas. 1914A, 1141, 44 L. R. A. (N. S.) 317); *Gardner v. Kinney*, 60 Or. 292, 296 (117 Pac. 971). See, also: *De Vol v. Citizens' Bank*, 92 Or. 606 (181 Pac. 985).

The decree appealed from is affirmed.

AFFIRMED.

McBRIDE, C. J., and BURNETT and BEAN, JJ., concur.

Rehearing denied October 7, 1919.

PETITION FOR REHEARING.

(184 Pac. 280.)

On petition for rehearing. **DENIED.**

Mr. Ernest C. Smith and *Messrs. Huntington & Wilson*, for the petition.

Mr. W. A. Robbins, contra.

Department 1.

BURNETT, J.—In his petition for a rehearing the defendant urges upon us the consideration of three several features of the testimony here set down:

"1. That the respondent Welch, through his attorney Charles A. Johns, on December 29, 1916, at a time when his attention was directed to the clause in question and he was informed that the appellant would make the claim that he has made and does make in this suit, stated that 'there is no contention over the terms and conditions in the conveyance.'

"2. That the same attorney, Charles A. Johns, in April, 1916, in a written statement to this court in behalf of Welch corporation, the Pacific Land Company, said that Welch assumed and agreed to pay the mortgage in and by the terms of the deed.

"3. That the respondent, the plaintiff at the trial, produced evidence showing that the deed in question was prepared in the office of Charles A. Johns, attorney for Welch, at the time the deed was prepared."

It will be recalled that the object of this suit was to correct an alleged mistake in a deed from the defendants Vreeland to the plaintiff Welch by striking out of the same the clause whereby Welch assumed and agreed to pay the note and mortgage held by Johnson as a lien upon the land conveyed, on the ground that it was inserted in the conveyance by the mutual mistake of the parties thereto. The testimony involved in the first specification of the petition is substantially as follows: Having foreclosed his mortgage, the attorney for the defendant Johnson, who was plaintiff in that proceeding, addressed a letter to the present plaintiff Welch at Portland, Oregon, directing his attention to the decree of foreclosure, notifying him that under the conveyance mentioned Welch was responsible for the payment of the debt evidenced by the note and secured by the mortgage, and calling upon him to pay it in full. This letter, dated December 28, 1916, was introduced in evidence. The defendant Johnson also read in evidence here a letter from Charles A. Johns, under date of December 29, 1916, addressed to the attorney for Johnson, which reads thus:

"Mr. Welch has handed me your letter to him of December 28, in which I note you claim he assumed and agreed to pay the Johnson note and mortgage, and that you are directed by Mr. Johnson to take such steps as may be necessary to collect his claim.

"There is no contention over the terms and conditions in the conveyance to Mr. Welch, but for many and different reasons he disclaims any personal liability to Johnson. Among other things, as I understand

the facts, the note and mortgage from Ricord to Johnson was a purchase money note and mortgage. At all events, there is no disposition on the part of Mr. Welch to pay this claim or any part of it, and I think after a careful investigation you will find he is not personally liable."

7. In this suit Johnson contends that this letter constitutes an admission binding upon Welch, to the effect that there is no mistake in the conveyance. If this construction is correct it would be fatal to the plaintiff's suit. In *Fleishman v. Meyer*, 46 Or. 267, 274 (80 Pac. 209), this court had under consideration the correspondence between the defendants and a firm of attorneys who seemed to be representing the plaintiffs in advance of any litigation between them, in the matter of an alleged breach by defendants of their contract to sell personal property to the plaintiffs. Want of a pending action is a condition attending the correspondence here in question. In that case the court said, speaking by Mr. Justice Moore:

"Authority to compromise the claim, as mentioned in the exceptions noted, will be implied only in the regular course of pending suits and actions, when an attorney has neither time nor opportunity to consult with his client, whose interest would be imperiled by delay. [Citing authorities.] The weight of authority in this country supports the rule that an attorney, by virtue of a mere retainer, has no implied power to bind his client by a compromise of his claim." [Citing still other precedents.]

If an attorney in advance of litigation cannot compromise his client's case, much less can he admit away the client's whole case.

There is nothing in the evidence for the defendant relating to the extent of the authority given to Johns to bind the plaintiff Welch by the letter in question.

On the other hand, as a witness for the plaintiff in rebuttal, Johns stated:

“That letter was written without a consultation with Mr. Welch or any knowledge of the facts concerning the execution of these deeds.”

In the absence of any pending litigation in which Johns was appearing as the attorney of record for Welch, no more importance can be attached to the letter than to the declaration of anyone else who assumes to speak for another. The case is not affected by the fact that the writer was a member of the Bar. He might as well have been the plaintiff's grocer or laundryman. It would be necessary to show that the declarations in the letter were authorized by the plaintiff and within the scope of the authority conferred upon the writer, before the writing could bind the plaintiff. How far an attorney may bind his client in compromise or renunciation of his claim, is discussed in *Pomery v. Prescott*, 106 Me. 401 (76 Atl. 898, 138 Am. St. Rep. 347, 21 Ann. Cas. 574, and note).

8. Much is claimed, also, for a statement made in the brief of the defendant in the case of *John R. Johnson, Plaintiff, v. Pacific Land Company, Defendant*, heard in this court at the March term, 1917, to the effect that the plaintiff there had sold the land here in question to Ricord, who conveyed to the Vreelands, and the latter to Welch, and that in each instance the grantees assumed and agreed to pay the mortgage. This brief was over the name of Charles A. Johns and Claude M. Johns. The action there was for the replevin of some personal property alleged to have been wrongfully removed from the mortgaged premises by the defendant there. We note that it was an incidental statement made in the brief by way of opening the argument for the defendant in that case. It was

res inter alios actos. It is not shown even that Welch was present at the argument of the case or knew that the statement was included in the brief. At the utmost, it could bind only the parties to that litigation.

Much the same is the case of *Patty v. Salem Flouring Mills Co.*, 53 Or. 350 (96 Pac. 1106, 98 Pac. 521, 100 Pac. 298). One question there involved was the custom of the defendant in dealing with farmers when it received wheat from them and issued receipts therefor. In the *Patty* case the trial court admitted evidence of the testimony of a witness in the previous case of *Savage* against the same defendant respecting such a custom. The court in an exhaustive opinion by Mr. Justice MOORE held that this was error. That case is controlling upon the second specification in the defendant's petition here.

9-11. Even if the deed in question was prepared in the office of the plaintiff's attorney, and this is questionable under the testimony, that would not necessarily make it less a mistake to include the clause in dispute. Even attorneys are not infallible and their errors are not necessarily conclusive upon their clients. This circumstance is properly considered on the point that to be relieved from a mistake it must appear that it was not due to the party's negligence, but, as pointed out in the former opinion, on the authority of *Pomeroy*, the negligence which will prevent the relief of a party from his mistake must be such as will amount to a violation of a positive duty owed to another party. Here, at the time the alleged mistake was made Johnson had already received his note and mortgage, together with the agreement of the Vreelands as grantees subsequent to Johnson to pay this same debt. In taking the conveyance from the Vreelands, Welch owed no duty whatever to Johnson. The latter was not in-

duced to surrender any right or to prejudice his situation by anything in the deed which Welch accepted. The negligence, therefore, whether of himself or of his attorney who wrote the deed, if he did write it, is not such as will prevent the correction of the mistake.

Summing up the whole matter of the evidence, we have the consensus of statement of the parties to the conveyance that it was a mistake to include such a clause and that it was not part of the agreement out of which the deed arose. All that is opposed to this positive statement are the inferences to be drawn from the correspondence alluded to and the possible fact that the deed was drawn in the office of a member of the Bar. As a matter of law, the letter mentioned was not binding upon the plaintiff here and the inferences to be drawn from the circumstances under which the conveyance was written are not of sufficient weight to overcome the direct, uncontradicted and explicit narrative of the parties.

The petition for rehearing is denied.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Mr. Justice JOHNS did not participate in the consideration of the original case or of the petition for rehearing.

Argued September 26, affirmed October 7, 1919.

KÖHLHAGEN v. CARDWELL.

(184 Pac. 261.)

Evidence—Conclusion Admissible as to Matter Difficult to State Otherwise.

1. In an action on a note, which defendants claimed to have paid by the delivery of butchered hogs, it was not error to permit plaintiff's bookkeeper to testify that when she returned to the shop it would have been impossible for her to have overlooked 36 hogs, the number claimed to have been delivered, had they been there, though the testimony was in some sense a conclusion.

[As to belief, motive or intent of witness in an action on contract, see note in 21 Am. St. Rep. 317.]

Evidence—Experiment to Determine Capacity of Wagons in Carrying Hogs.

2. In an action on a note claimed to have been paid by defendants by the delivery of 36 butchered hogs, testimony as to an experiment in loading hogs on wagons, such as defendants claimed had been used in the delivery, introduced by plaintiff, *held* admissible, in so far as it had any effect at all.

Costs—Mileage for Nonresident Witnesses from State Line Allowed.

3. The court properly taxed against defendants as costs single mileage from the state line to the place of trial for plaintiff's witnesses, who came at his request from outside the state without being subpoenaed after they entered the state; it being desirable that they should testify orally to the jury, in view of the conflicting evidence.

From Douglas: JAMES W. HAMILTON, Judge.

Department 2.

This is a very remarkable and unusual case. The plaintiff sues upon a promissory note. The defendants admit the note but claim to have paid the same by the delivery of 36 head of hogs, weighing 7,772½ pounds, at the market price of 15 cents per pound, amounting to the total of \$1,165.87. The plaintiff denies this payment *in toto*, and denies that he ever received 36 hogs, or any hogs at all, from the defendant at the time in question, or upon the debt in question.

The defendant is corroborated in his claim, that he delivered the hogs, by his son and his wife and by the testimony of two hired men, who testified that they helped to butcher the hogs and haul them to Roseburg and deliver them to plaintiff. In addition to this, the defendant's story is corroborated, to some extent, by the testimony of people who lived along the road between defendant's ranch and Roseburg and who claim to have seen him hauling hogs in the direction of Roseburg at about the time in question. The defendant claims to have delivered the hogs at plaintiff's butcher-shop in Roseburg, just at noon, and at a time when the plaintiff himself was not actually present. He claims to have delivered the hogs to James Kooken and George Hoefling, who were employees of the plaintiff working at the butcher-shop in question. Defendant also testifies that one Andy Morgan, who was working for him at the time, in his prune orchard, assisted in butchering the hogs and rode with him on the wagon which he was driving to town, and helped to deliver the hogs to the plaintiff.

On the other hand, the plaintiff testified that he never received any hogs from the defendant on the debt; and plaintiff's books fail to show that any were received. Kooken and Hoefling, the two employees of plaintiff to whom defendant claims to have delivered the hogs, testify positively that no hogs were delivered. These witnesses are corroborated by Fred Neurither, who worked in the back of plaintiff's shop, and Alice Mann, the bookkeeper; and also by plaintiff's daughter, Florence Kohlhausen. All of these witnesses testified that no hogs were delivered by Cardwell. In addition to this testimony the plaintiff, in this last trial, offered the testimony of Andy Morgan, one of the employees of the defendant at the time

the hogs are alleged to have been butchered on his ranch; and whom, the defendant testified, assisted in the butchering and in transporting the hogs to Roseburg and delivering them there to the plaintiff. This witness testified positively that he was at work at the defendant's ranch at the time in question, but that he did not assist in butchering any hogs there or in transporting them to Roseburg or delivering them to the plaintiff. In fact, he testified that no hogs were butchered at defendant's ranch at or about that time.

At the trial there was a verdict for the plaintiff. There are only two claims of error occurring at the trial, both of which refer to the admission of testimony. When Alice Mann, plaintiff's bookkeeper, was on the stand and having testified to the particulars in regard to her presence at the shop that day, she was asked the following question:

"Q. Now would it be possible for 36 head of dressed hogs to have come into the shop, on the 1st day of March, 1917, or about that time, before you left on March 7th, and you not know it?"

The objection to this question was overruled and the witness answered:

"A. It would be impossible for them to come and me not see them when I came back. I would see even two or three hogs and certainly could not overlook 36."

This was one of the errors complained of. The other had reference to certain experiments as to the space occupied by hogs in the wagon. This will be noticed more particularly in the body of the opinion.

AFFIRMED.

For appellants there was a brief over the names of *Messrs. Rice & Orcutt* and *Mr. Elbert B. Hermann*, with an oral argument by *Mr. A. N. Orcutt*.

For respondent there was a brief and an oral argument by *Mr. B. L. Eddy*.

BENNETT, J.—1. We think there was no error in permitting the witness, Alice Mann, to testify as to whether or not the hogs could have been in the shop without her seeing them. This, of course, was in some sense a conclusion; but whether they could have been there and escaped her observation depended on a great number of small details—the general course of business—the place where hogs were hung—the arrangement of the building and position of windows and doors therein—her own position in the building—her own habits of observation and alertness of mind and the extent to which she kept the business under her personal observation. These were all matters that could hardly have been accurately and fully reproduced to the jury. Under such circumstances the witness is permitted to state her conclusion, which is treated as a conclusion of fact under the authorities.

In Lawson on Expert and Opinion Evidence, page 509, the author quotes with approval from the opinion in the case of *Cavendish v. Troy*, 41 Vt. 107, as follows:

“Where the witness has had the means of personal observation and the facts and circumstances, which lead the mind of the witness to a conclusion, are incapable of being detailed and described so as to enable anyone but the observer himself to form an intelligent conclusion from them, the witness is often allowed to add his opinion or the conclusion of his own mind.”

In the Vermont case quoted from, the witness was being interrogated as to the residence of another party in a certain town, and was asked:

“Q. From your opportunities of knowing, as you have stated them, do you think it possible for T. to have lived in J. that year and you not have known it?”

And the question was held proper.

In *Rodgers on Expert and Opinion Evidence*, page 9, Section 4, it is said:

“Witnesses are allowed to express opinions based on facts within their personal observation when the facts cannot be so described as to enable another to draw any intelligent conclusions therefrom.”

It is also claimed that there was error, in permitting the evidence of certain witnesses for the plaintiff, in regard to experiments made by them in loading hogs in a wagon. The defendant had testified that the hogs delivered by him were carried in two wagons, twelve in a small or ordinary wagon which, however, had a bed 16 inches longer than an ordinary wagon, and twenty-four of them in a large wagon with a rack. This rack, according to the testimony of the defendant, was 14 feet long and about the width of an ordinary wagon, and that the rack on this wagon was 3 ft. 6 in. high. There is a discrepancy between the testimony of this witness, as to the height of the wagon, and that of Dug Good, from whom the wagon was obtained, who testified that it was only 32 instead of 42 inches high. The testimony of the defendant is to the effect that the hogs were put in the wagon in layers, three in each layer lengthwise across the bed of the wagon, and then others were piled in upon these in the most convenient way. According to the testimony of the defendant the hogs taken in by him would average about 216 pounds in weight. The experiments made by the defendant were with an ordinary wagon, and the hogs weighed 219 pounds each, and the experiment was made with eight hogs.

2. In the matter of the experiment, there was no attempt to fill the wagon, which was only 29½ inches high, and the only effect of the testimony was to show

about what space such hogs would occupy in a wagon. The testimony was to the effect that three such hogs could be laid lengthwise in a tier across the wagon. This was in accordance with the testimony of the defendant, who testified that the hogs transported were laid in the wagon in that way. The testimony was, that two tiers of the hogs were $10\frac{1}{2}$ feet long, and that each hog was 16 inches one way and 12 the other, and the 3 hogs in each row filled the bed up the full width, and when one hog was laid sideways across these it filled the bed up to within 6 inches of the top. This testimony does not seem to have had much weight and it probably did not influence the jury at all. Indeed, in some respects, as we have seen, it corroborated the testimony of defendant. If the large rack was 42 inches high, as testified by defendant, the testimony rather tended to show that 24 hogs could have been loaded in such a rack 14 feet long.

It is practically conceded in the brief of the learned attorney for the defendant, that the evidence had no logical effect in the case; but it is urged, that—

“The jury would naturally conclude that this evidence must be beneficial to the respondent or he would not have called the witnesses, and being unable to figure out for themselves what benefit it was, took it for granted that it was beneficial, and that these men would not have come in and testified unless their evidence was beneficial to the respondent.”

We cannot assume that the jury were so lacking in intelligence as to be carried away and influenced by such artificial and illogical considerations. On the contrary, we must presume that they were men of ordinary and usual intelligence and that they would decide the case according to the evidence, without refer-

ence to the mere number of witnesses called by the respective parties.

The questions involved in this case were peculiarly for the jury, involving as they did so much of conflict in the direct testimony of the witnesses, and so many conflicting circumstances corroborating each side. The jury heard and saw the witnesses and could compare their testimony and judge of their credibility. The case seems to have been fairly tried, as the record is unusually free even from claim of error. Even if we thought that the testimony, as to the loading of these hogs, was on the whole inadmissible, it would seem a trifling thing upon which to reverse a case which had otherwise been fairly tried. It is so unlikely and improbable that the evidence substantially affected the verdict and it is so minor and unimportant in its character, we should hesitate to reverse the case upon that ground.

Besides we think the evidence, so far as it went and so far as it had any effect at all, was admissible. It only went to the extent of showing what space in an ordinary wagon-box eight hogs would fill. The hogs were practically the same size as the average of the hogs hauled by the defendant. The average of one lot was 215 pounds and a fraction over, and the other 219 pounds and a little over, or about four pounds difference. This was about as close as was possible and the wagon-boxes were practically the same in width. The length of the wagon-box or its height did not cut any figure so far as the experiment went, for it was not claimed that the hogs loaded on experiment filled the whole space of the wagon-bed either as to length or height, so the only effect of the experiment was to show the space occupied by each hog, the number that could be put in a tier across the bed and the

length of two tiers of such hogs in the bed. For these measurements the conditions of the experiment were almost exactly similar with the conditions as to the hogs loaded by defendant. As we have already said, the evidence certainly did not go very far and probably did not at all contradict the evidence of the defendant. Nevertheless, it might assist the jury somewhat, in arriving at a conclusion as to how many hogs could be loaded in such wagons to know how much space would be taken by such a hog.

The conditions do not have to be as we understand it, exactly alike, in order to sustain the admission of the experimental testimony. Such testimony is largely in the discretion of the court and it is only necessary that the facts of the experiment be reasonably similar to those in the main contention and not misleading in their character. In one of the Lake Labish cases—*Leonard v. Southern Pacific Co.*, 21 Or. 555 (28 Pac. 887, 15 L. R. A. 221),—the defendant contended that the fall of the bridge and the ensuing wreck was caused by someone having placed a loose rail across the rail of the defendant's track. The plaintiff, in rebuttal, produced a loose rail at the trial, and a car-wheel, and undertook to show by experiment that the marks on the loose rail introduced by defendant could not have been caused in that way. The conditions were not exactly the same. The bottom rail was loose instead of being fast to the track and the wheel offered in evidence was only 26 inches, whereas the wheel of the locomotive was 33 inches in diameter. It was urged that the conditions were not sufficiently similar to justify the introduction of the experiment in evidence. Mr. Justice LORD, delivering the opinion of the court, said:

"In all cases of this sort very much must necessarily be left to the discretion of the trial court, but when it appears that the experiment or demonstration has been made under conditions similar to those existing in the case at issue, its discretion ought not to be interfered with."

In *Davis v. State*, 51 Neb. 301 (70 N. W. 984), there was a controversy as to whether or not the defendant could have unscrewed certain bolts and drawn the spikes, and torn up the track with a monkey-wrench and claw-bar offered in evidence. The place in question was on a trestle, and the state was permitted to offer evidence as to experiments in tearing up a track at another place on the tracks of defendant, where the track ran along the ground and not on a trestle. The court held the evidence admissible, saying:

"It was for the jury to consider the place where the displacement of the fixtures occurred and the place where the experiment was made, and then to give such weight to the testimony of the state's witness who made the experiment, as they thought it deserved."

In *Sonoma County v. Stofen*, 125 Cal. 32 (57 Pac. 681), the county treasurer being sued for a balance of county money in his hands, claimed that he had been robbed of the money, and that the robber had knocked him down and left him unconscious, and locked him in the vault where he remained for a number of hours. The vault was in his office and was connected by doors with the sheriff's office in another part of the building. He claimed to have kicked violently against the door after he became conscious and made all the noise he could in that way. The state offered evidence of witnesses, who had made experiments by kicking at the door in the vault, and the testimony of other witnesses in the sheriff's office and other parts of the

courthouse who had heard the sound made in the vault. There had been some changes in the building and it was not shown that the climatic or atmospheric conditions were the same. It was urged that the conditions were not sufficiently similar to justify the evidence of the experiment. The court held otherwise, saying:

“Experimental evidence in corroboration or disproof depends, for its value, upon the fact that the experiment has been made when the conditions affecting the result are as near as may be, identical with those existing at the time of and operating to produce the particular effect. An absolute identity is, of course, impossible but a substantial identity must exist to give the evidence value. But this identity need not extend to nor be shown to exist as to conditions which could have had no causal operation upon the result.”

The authorities are not very definite as to just how closely similar the conditions of the experiment must be to the facts in contention, in order to make the experiment admissible. We think, however, a fair statement of the rule would be, that if the experiments are not likely to be misleading to the jury in any particular, and are under conditions similar, so that they would be of assistance to the jury in arriving at a correct verdict, the evidence is admissible.

We think the experiment in this case came within this rule. The hogs were practically of the same size as the average of those shipped by the defendant, and the wagon-box was a standard wagon-box in each case. These were the important conditions for this experiment, as far as it went. It is true that the wagons were not of the same length, but that fact was in no way misleading to the jury, for the difference was in evidence before them, and there was no attempt on the

part of the plaintiff to show any more than the mere fact of how much space in length and in width the two tiers of hogs took and the height of such tiers. This was as far as the experiment went, and the length of the wagon-box, or even its height, did not enter into the question at all. We think, therefore, the admission of the testimony in regard to these experiments was within the sound discretion of the court.

3. The only other question involved, refers to the taxation of costs. The plaintiff in his cost bill, included mileage for the witnesses Kookan, Hoefling and Morgan, from the place where they entered the state line. These witnesses resided out of the State of Oregon, one at Seattle, Washington, one at Pocatello, Idaho, and one in Massachusetts. They were not subpoenaed, but came as witnesses at the request of the plaintiff. It is stipulated that they actually traveled the miles claimed, from the state line to Roseburg, the place where the trial was held. It is claimed on behalf of the defendant, that as these witnesses did not reside within the State of Oregon, and were not subject to subpoena in this state, and as the court did not and could not effectively order their personal attendance, the plaintiff is not entitled to recover mileage for such witnesses.

We think the question is concluded by the principles announced and the reasoning in the cases of *Crawford v. Abraham*, 2 Or. 166, and *Egan v. Finney*, 42 Or. 599 (72 Pac. 133). In the *Crawford* case it is said:

“Mileage will not be allowed for witnesses *beyond* the boundaries of the state.”

It is also said in that case:

“The attendance of witnesses may be procured by request of parties or by agreement, and the parties so

liable may recover disbursements for such mileage and attendance.

"The statutory means of compelling the attendance of witnesses is by subpoena duly served but we are at a loss to see how any party can be injured in having to pay mileage and attendance merely for the witnesses of an adversary, who attends upon request or agreement, when the additional expense of officers' fees and mileage for issuing and serving of a subpoena, swelling largely the claim for disbursements, could do no more than procure the attendance of the witness."

In this case the witnesses might unquestionably have been subpoenaed at the state line and compelled to attend, and in that event it seems clear that they would have been entitled to their mileage from the state line, and, as is said in the Crawford case, the defendant could lose nothing by the fact that they were not regularly subpoenaed. In *Egan v. Finney*, 42 Or. 599 (72 Pac. 133), the court held that the witnesses in question were not properly subpoenaed. One of them had come a long distance from Baker County. The court said:

"These witnesses attended, however, in pursuance of a request, and as the court found their testimony was material, relevant and competent, they are entitled to single mileage and per diem, if their oral examination was important and desirable. * * The issue in this suit involving an inquiry as to angles, lines, courses, and distances, an examination of the transcript, in the light of the maps introduced in evidence, shows that the oral examination of these witnesses was important and desirable. They are, therefore, entitled to single mileage."

These decisions establish the rule, that a party may recover single mileage for witnesses who reside in some other county of the state, where their oral testimony is desirable, even although they may not have

been regularly subpoenaed or served with an order of the court, and it is fully established in the Egan case, as we think, that the court may look to the whole record as to the necessity and desirableness of securing the attendance of the witnesses.

It is true that in neither of these cases does it appear that any of the witnesses resided outside of the boundaries of the state, but in this regard we cannot see any distinction between the case of a witness who resides in Baker County, and one who comes across the state line into Baker County, from another state—in the latter case they are subject to a subpoena as soon as they cross the state line—and in neither case is the adverse party in any way prejudiced, or his costs increased, by the fact that they were not regularly subpoenaed and compelled to attend.

In this case, as we have already seen, it appears from the record that there was a very great conflict between the witnesses for the plaintiff and defendant on the vital point in the case. We think that if there ever was a case where it was important and desirable that the witnesses should testify orally so the jury could have an opportunity to observe them, and judge of their manner on the witness-stand and of their credibility, this was such a case. We think, therefore, there was no error of the court in taxing single mileage for these witnesses from the state line to the place of the trial.

AFFIRMED.

BEAN, BURNETT and HARRIS, JJ., concur.

Argued September 18, affirmed October 7, 1919.

KAUFMAN v. HASTINGS.

(124 Pac. 265.)

Exchange of Property—Time for Adjusting Commissions Identical With Period for Making Exchange.

1. Contract for exchange of properties, though providing that it may be declared canceled if a satisfactory adjustment of the real estate agent's commission cannot be effected, not providing any time therefor, time for adjustment is identical with the period named for making the exchange.

Specific Performance—There Being No Such Stipulation, Time is not Essence of Contract.

2. Though contract for exchange of properties names a period within which conveyances shall be executed and exchanged, there being no stipulation that time is of the essence, it will not be considered so in action for specific performance; the parties having used diligence and acted in good faith, and there not being any change of circumstances affecting the equities.

Mortgages—Trust Deed to Secure Debt Conveys Legal Title Only to Enforce Trust.

3. Under the laws of California, a trust deed to secure a specified debt, amounts only to an encumbrance, and conveys the legal title to the trustee only in so far as may be necessary to the execution of the trust.

Specific Performance—Contract of Married Man Relating to Realty Enforceable Against Him.

4. Contract of a married man to sell real estate, though not joined in by his wife, may be specifically enforced against him.

[As to specific performance of husband's contract to convey realty when wife refuses to join, see notes in 14 Ann. Cas. 671; Ann. Cas. 1914A, 202; 24 L. E. A. 764.]

Specific Performance—Of Exchange of Properties not Ineffective for Failure to Assign Insurance.

5. Specific performance of contract for exchange of realty may not be complained of because of failure to assign insurance policies; the decree covering the matter, and it being necessary to validity of such assignment that the properties be first exchanged.

[As to specific performance of contract to exchange lands, see note in Ann. Cas. 1918D, 717.]

From Multnomah: ROBERT TUCKER, Judge.

Department 1.

On November 6, 1916, the defendant was the owner of the lot known as No. 680 East Harrison Street in

the City of Portland, Oregon, and the plaintiff was the owner of a lot numbered 1608 Arch Street, in the City of Berkeley, California. After making an examination of each other's property they agreed to an exchange of the realty and executed a written contract by which the defendant agreed to assume an encumbrance of \$5,000 on the Berkeley property, which was otherwise to be free and clear of any lien or charge. The plaintiff in turn was to assume an encumbrance of \$4,000 on the Portland property and execute a second mortgage thereon of not to exceed \$1,000, in favor of Hastings, payable on or before two years from date, with interest at 7 per cent per annum. Otherwise the Portland property was to be free and clear of lien, excepting a municipal bonded indebtedness not exceeding \$200, the intention being to have the amount of the second mortgage cover the difference between the existing liens on the two properties.

The plaintiff alleges that about November 10, 1916, with Marie Kaufman, his wife, he made and executed a good and sufficient deed of conveyance of their property to the defendant under the terms of the contract; that on November 15th following, the deed was duly tendered; that on November 20th the Kaufmans duly executed a second mortgage on their Portland property in favor of the defendant for the sum of \$1,000; that on November 27th the said mortgage covering the amount of the difference of the existing encumbrances upon the property to be exchanged, as provided in the written agreement, was tendered to the defendant; that the tenders have since remained and are now in force and effect; that the plaintiff has kept and performed all of the terms and conditions of the written contract by him to be kept and performed, and is ready, able and willing to carry out such agreement,

and that in violation thereof the defendant has failed, neglected and refused to carry out his part.

It is further alleged that prior to the time when the defendant repudiated his contract, it was understood and agreed that the broker would take and accept \$400 in full for his services in effecting the exchange of properties, of which amount the plaintiff was to pay \$200; that the real estate commission was then fully and finally settled and adjusted as provided in the contract, and that the writing is in full force and effect. The plaintiff prays for a decree of specific performance.

A demurrer to the complaint was filed, which was overruled by the court, and the defendant answered, admitting the execution of the written contract but denying all other material allegations. As an affirmative defense he alleges that on March 30, 1912, the plaintiff conveyed to the Berkeley Bank of Savings & Trust Company the identical property described in the complaint, and a copy of the deed is attached to and made a part of the answer as evidence that the plaintiff did not have and could not convey a valid title to the property. The answer further avers that A. L. Wiesenhaven acted as the agent and broker of the plaintiff in the transaction; that the defendant was to pay his commission and if the agent should demand more than \$203 for his services and a satisfactory adjustment could not be made, the defendant had and reserved the right to cancel and annul the contract and refuse to carry it out; that the agent, claiming \$900 as a reasonable fee for his services, proposed to the defendant to accept \$600 in full payment and declined to take any less amount; that no adjustment of the agent's commission satisfactory to the defendant was or could be arranged; that inasmuch as the claim was

for \$600 and the defendant was not willing to pay more than the stipulated amount, on November 20, 1916, he exercised his right under the terms of the contract to, and did, cancel and annul the same, refused and declined to carry it out and so notified the plaintiff.

A reply was filed denying all new matter in the answer. After the case was at issue the defendant filed a motion for judgment on the pleadings, which was overruled. Testimony was taken and the trial court rendered a decree of specific performance as prayed for in the complaint. The defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Raymond L. Sullivan* and *Messrs. Emmons & Webster*, with an oral argument by *Mr. Sullivan*.

For respondent there was a brief with oral arguments by *Mr. C. L. Whealdon* and *Mr. Ralph R. Duniway*.

JOHNS, J.—The contract provides that “the deeds and other conveyances necessary to complete this transaction will be executed and exchanged within fifteen days from date,” and that “in the event the real estate agent or agents demand a commission in excess of two hundred (\$200.00) dollars, it is hereby mutually agreed that if a satisfactory adjustment of such commission cannot be effected, this agreement may be declared canceled and of no effect.” Before the contract was executed a personal examination of the respective properties was made by each party. At that time the plaintiff, who was the owner of the Berkeley property, was a resident of Portland, Oregon, and Mrs. Kaufman, his wife, was then in Berkeley. The defendant, who owned the Portland property, was

then residing in Berkeley, where the broker Wiesenhaven had his place of business.

It is apparent that the agreement was entered into in good faith by both parties and that each of them was then ready and willing to make the exchange when the amount of the commission could be amicably determined. Steps were at once taken to agree upon the amount. The broker first demanded \$900 for his services, which both parties refused to pay. After a conference he reduced his claim to \$600 and after a further talk with the plaintiff's wife in his office he agreed to accept \$400 in full for his services. Of this amount the plaintiff was to pay \$200, leaving the remainder to be paid by the defendant under the terms of the contract. The broker assented to this and he and the plaintiff's wife called at the defendant's place of business and advised him of the arrangement. The broker testifies that this occurred about 3 o'clock in the afternoon of November 20th, and on that point he is corroborated by Mrs. Kaufman. It appears that on the same day, before that conversation, the defendant had notified the broker that the deal was off, but the latter testifies that he was not acting for or representing Hastings in the transaction. On that day, also, the defendant addressed a letter to the plaintiff at Portland, advising him that on account of failure to adjust a commission the deal was off. This letter was postmarked "San Francisco, November 20, 1916, 4 P. M." Assuming that the testimony of the broker is true, the letter was deposited in the postoffice one hour after the conversation between the defendant, the plaintiff's wife and the broker regarding the arrangement as to the commission.

It will be noted that the contract was dated November 6, 1916. On November 11th at Portland the

plaintiff executed and acknowledged his deed to the Berkeley property and forwarded it to his wife with instructions to sign and arrange for its delivery upon the receipt of the defendant's deed to the Portland property. The evidence is not clear as to when she actually executed the deed, but Joseph L. MacFarland testified that he was vice-president of the Alameda County Home Builders and that in such capacity he received the deed duly executed, on or about November 15, 1916, with instructions that it should be held in escrow until a settlement was made between Mr. Kaufman and Mr. Hastings; that "when Mr. Hastings delivered his deed, the Kaufman deed was to be delivered to him," and that "I gave Mr. Hastings the deed to read and he was evidently conversant with the conditions." His evidence is corroborated by Arthur E. Weed, the bookkeeper of that company, who testifies that the tender was made "verbally, and about the thirteenth to the seventeenth of November, 1916," and that "Mr. Hastings was told that the papers were here duly executed, ready for delivery to him." It further appears that about November 25th the deed in question was placed in the Berkeley Bank of Savings & Trust Company with such instructions and that the bank gave the defendant written notice thereof. It is also shown that on November 20, 1916, in Portland the plaintiff executed in favor of the defendant his promissory note for \$959.73, in the usual form, payable on or before two years after date, with interest, and that to secure its payment he executed and acknowledged a certain mortgage on his Portland property, which was forwarded to his wife at Berkeley with proper instructions. Mrs. Kaufman duly executed the mortgage and it was placed in the bank about November 25, 1916, and two days later the bank notified the defendant of

its receipt and of the instructions. Since that time the bank has held the deed, note and mortgage subject to the defendant's order.

1, 2. While it is provided in the contract that "all deeds and conveyances necessary to complete this transaction will be executed and exchanged within fifteen days from date," there is no stipulation that time is of the essence of the contract. Neither is there any provision as to the time the agreement "may be declared canceled and of no effect" for the failure to make a "satisfactory adjustment of such commission." As we construe it, the time within which the commission was to be adjusted was not fixed by the contract, but would be identical with the period named by the terms and provisions, within which the exchange of properties should be made. In *Wright v. Astoria Co.*, 45 Or. 224, 228 (77 Pac. 599), it is said:

"There was no understanding or stipulation that the deed should not be delivered unless plaintiff paid the purchase price by a day certain. In equity the time of payment is not of the essence of a contract for the sale of real estate unless made so by express agreement of the parties, by the nature of the contract itself, or by the circumstances under which the contract was executed.

"Specific performance of a contract for the sale of real estate will ordinarily be decreed, even though the purchase money was not paid or tendered at the exact time fixed by the contract, when the party seeking the performance has acted in good faith, and with reasonable diligence, unless there has been such a change of circumstances affecting the equities of the parties or the justice of the contract as to make it inequitable that it should be enforced." (Citing authorities.)

In the instant case it appears that both parties used due diligence in trying to adjust the amount of the broker's commission; that on November 20, 1916, the

amount which the defendant was to pay was ascertained and determined within the terms of the contract; that the plaintiff acted in good faith in executing and tendering the deed, note and mortgage and that there has not been any such "change of circumstances affecting the equities of the parties or the justice of the contract, as to make it inequitable that it should be enforced."

The agreement provided that—

"In said exchange of properties the said Herman S. Hastings will assume an encumbrance on the Berkeley property of not to exceed five thousand (\$5,000.00) dollars, said Berkeley property to be free and clear of all other encumbrances of whatsoever nature."

There is no other provision as to the character or nature of plaintiff's title. It appears that on February 1, 1912, the plaintiff executed a trust deed of his property to the Berkeley Bank of Savings & Trust Company to secure a debt to Walter H. Ratcliff, Jr., of \$5,438.94 with interest at 7 per cent per annum, to be paid in graduated installments which on and after February 1, 1914, were to be at the rate of \$75 per month with accrued interest. The deed recited that the plaintiff did "grant, bargain, sell, convey and confirm unto the party of the second part and unto its heirs and assigns all of that piece or parcel of land situate in the City of Berkeley, County of Alameda, State of California," as the same is described in the complaint, "to have and to hold the same to the party of the second part, and to its heirs and assigns, (said party of the second part and its heirs or assigns being hereby expressly authorized to convey, subject to the trust herein expressed, the land above described) upon the trusts and confidences hereinafter expressed."

3. The defendant insists that under the laws of California this trust deed was an absolute conveyance and that at the time of the execution of the contract the plaintiff did not have any title to his property to convey. He cites a number of California decisions to support his contention. While there may have been a conflict in the early decisions of that state, as to the force and effect of such a deed, we think that the question was fully and finally settled in the case of *MacLeod v. Moran*, 153 Cal. 97 (94 Pac. 604), where in commenting upon the precedents the opinion says:

"These decisions are based upon the fact that such a deed, though in form a grant, is really only a mortgage, and does not convey the fee. A trust deed of the kind here involved differs from such a deed only in that it conveys the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. * * The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property as against all persons except the trustees and those lawfully claiming under them: Civ. Code, §§ 865, 866. Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title. * * The legal estate thus left in the trustor or his successors entitles them to the possession of the property until after their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitled them to exercise all the ordinary incidents of ownership in re-

gard to the property, subject always, of course, to the execution of the trust."

In the instant case the trust deed was executed to secure a specified existing debt. When that debt is discharged according to its terms the plaintiff or his successor in interest is *ipso facto* entitled to a reconveyance of his realty.

The testimony shows that at the time the exchange contract was executed the amount of that existing debt was less than \$5,000 and that the plaintiff was not in default in any of his specified payments. According to the terms of the contract the defendant was to assume an encumbrance upon the plaintiff's property of not to exceed \$5,000, and under the authority of *MacLeod v. Moran*, 153 Cal. 97 (94 Pac. 604), we hold that the trust deed which the plaintiff executed to the bank was an encumbrance. It is shown by the record that the amount did not exceed \$5,000. By the payment of that sum the defendant would acquire title to the property free and clear of any charge, lien or encumbrance.

4. The exchange contract was not executed by the wife of either party and it is contended that—

"A contract for the sale of real estate in which the wife of the contractor is not joined cannot be specifically enforced."

The plaintiff does not seek a specific performance of the contract as against the wife of the defendant, and it is shown that the plaintiff's wife has joined in the conveyance of his property to the defendant and in the execution of the mortgage.

5. Complaint is made of the failure to assign policies of insurance. Prior to the exchange of properties such assignments would be void. In any event they would be a matter of minor importance and are

now fully covered by the decree of the trial court. No objection whatever was made to the form or substance of the deed, note and mortgage which were tendered.

From a careful examination of the record we are convinced that the plaintiff acted in good faith, used due diligence to carry out the exchange contract and is entitled to specific performance. The decree of the Circuit Court is affirmed.

AFFIRMED.

BENSON, HARRIS and BENNETT, JJ., concur.

Argued September 17, remanded October 7, 1919.

LJUBICH v. WESTERN COOPERAGE CO.

(184 Pac. 551.)

Ambassadors and Consuls—Consul General may Authorize Action on Behalf of Citizen of His Country.

1. Under treaties between the United States and Austria-Hungary, which contained the usual most favored nation clause, and treaties between the United States and other countries, *held* that consul general of Austria-Hungary might authorize attorneys to institute action on behalf of an Austro-Hungarian national where conditions were such, because of the war between Austria-Hungary and other countries, that it was practically impossible for the national to directly authorize the institution of the action.

From Multnomah: **CALVIN U. GANTENBEIN, Judge.**

Department 1.

This action was originally instituted by and in the name of Yoze Ljubich to recover damages, under the Oregon Employer's Liability Act, against the defendant for the death of Yure Ljubich through the alleged negligence of defendant. Deceased was killed on the thirteenth day of September, 1915, and the complaint was filed March 1, 1916. The complaint is in the usual

form and alleges that plaintiff is the mother of deceased. Under the statute, the right to bring the action is concededly in the mother. The complaint was verified by the attorneys for plaintiff, to the form or substance of which there is no objection.

On the twenty-second day of March, 1916, defendant's attorneys filed a motion, supported by affidavit, requesting the court to require plaintiff's attorneys to produce the authority under which they claimed to act for plaintiff. The affidavit set forth that affiant was informed and believed that other attorneys in the City of Portland were representing the mother, and that Woerndle and Haas, who claimed to represent her, have no other authority than the direction of the Austrian-Hungarian Consul at San Francisco to bring this action in the name of the mother. No action was taken by the court until January 12, 1917, the case having meantime been put at issue and the attorneys for the plaintiff having filed an affidavit, showing that the jurisdiction of the Imperial Consul of Austria-Hungary at San Francisco embraced the State of Oregon; that affiant knew of no one in Oregon representing the plaintiff; that no definite power of attorney had been secured, authorizing affiant to institute the action, because of war conditions in that part of Europe where plaintiff was residing, which conditions rendered it impracticable to procure legal documents and forward them; that plaintiff's attorneys instituted the action, pursuant to instructions from the Consul-General representing Austria-Hungary, which authorization was attached to the affidavit and which was sufficient in form and substance to authorize plaintiff's attorneys to act if the Consul-General had power to so direct. Thereupon the court, holding that the letter of the Austrian Consul-General was not suffi-

cient authority to enable the attorneys to institute the suit, ordered proceedings stayed until they should produce further authority which, being unable to do, they appealed to this court, and while the appeal was pending here, war was declared between Austria-Hungary and the United States. REMANDED.

For appellant there was a brief over the names of *Mr. C. T. Haas* and *Mr. Joseph Woerndle*, with an oral argument by *Mr. Haas*.

For respondent there was a brief over the names of *Messrs. Senn, Ekwall & Recken* and *Mr. Dan J. Malarkey*, with an oral argument by *Mr. F. S. Senn*.

McBRIDE, C. J.—Upon the argument here, counsel have presented the single question, namely: The right of the Consul-General of Austria-Hungary, under any circumstances, to authorize an action to be commenced in the name of a national without express authority from the person named as plaintiff in such action. The contention of plaintiff's attorneys, when reduced to its plainest terms is, that the Consul, by virtue of his office and the treaty between the United States and Austria-Hungary was, in effect, the official attorney in fact of all nonresident aliens who were not represented by an attorney in fact of their own selection, and, as such, was authorized to employ attorneys and institute proceedings to defend or enforce the rights of any of his nationals not otherwise represented. Such right being denied by defendant and its contention being sustained by the court, we will now proceed to consider the point at issue.

For a proper understanding of the question it will be necessary to examine and consider the various

treaties bearing upon the subject of the rights of foreign consuls accredited to this country, and the reciprocal rights of consuls of our own country abroad.

Article II of the treaty of August 27, 1829, between this country and Austria-Hungary, reads as follows:

"The citizens or subjects of each party shall have the power to dispose of their personal goods within the jurisdiction of the other, by testament, donation or otherwise; and their representatives being citizens or subjects of the other party, shall succeed to their personal goods, whether by testament or *ad intestato*, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their will, paying such dues, taxes or charges only, as the inhabitants of the country, wherein the said goods are, shall be subject to pay in like cases."

The following articles of the consular convention, entered into between this country and Austria-Hungary on June 29, 1871, also have an important bearing upon the question here discussed, and are as follows:

"Art. VIII. Consuls-General, Consuls, Vice-Consuls, or Consular Agents of the two countries may, in the exercise of their duties, apply to the authorities in their district, whether federal or local, judicial or executive, in the event of any infraction of the treaties and conventions between the two countries; also for the purpose of protecting the rights of their countrymen. Should the said authorities fail to take due notice of their application, they shall be at liberty, in the absence of any diplomatic representative of that country, to apply to the Government of the country where they reside.

"Art. XVI. In case of the death of a citizen of the United States in the Austro-Hungarian Monarchy, or a citizen of the Austro-Hungarian Monarchy in the United States, without having any known heirs or testamentary executors by him appointed, the competent

legal authorities shall inform the Consuls or Consular agents of the state to which the deceased belonged, of the circumstances, in order that the necessary information may be immediately forwarded to the parties interested.

“Art. XV. Consuls-General, Consuls, Vice Consuls, and Consular agents, also Consular Pupils, Chancellors, and Consular Officers shall enjoy in the two countries all the liberties, prerogatives, immunities and privileges granted to the functionaries of the same class of the most favored nation.”

The effect of the last clause above quoted was to import into the treaty of June 29, 1871, every reciprocal concession granted to any nation by any treaty then or thereafter concluded; and in order to ascertain what provisions or other stipulations were, by the “most favored nation” clause of the Austria-Hungarian convention incorporated into it, we quote the following excerpts from various treaties between this country and other nations.

Article IX of the treaty of 1853 between the United States and the Argentine Republic, is as follows:

“If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul General or Consul of the nation to which the deceased belonged, or the representative of such Consul General or Consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.”

The treaty entered into between the United States and the German Empire December 11, 1891, contains the following provision:

“Art. VIII. Consuls-General, Consuls, Vice-Consuls and Consular Agents shall have the right to apply

to the authorities of the respective countries, whether Federal or Local, judicial or executive, within the extent of their consular district, for the redress of any infraction of the treaties and conventions existing between the two countries, or of international law; to ask information of said authorities and to address said authorities to the end of protecting the rights and interests of their countrymen, especially in cases of the absence of the latter; in which cases such consuls, etc., shall be presumed to be their legal representatives. If due notice should not be taken of such application, the consular officers aforesaid, in the absence of a diplomatic agent of their country, may apply directly to the government of the country where they reside."

The treaty between the United States and Peru, dated August 31, 1887, contains the following provision:

"Until the conclusion of a consular convention which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated that in the absence of the legal heirs or representatives, the Consuls or Vice Consuls of either party shall be *ex-officio* the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea, whose property may be brought within their district." (Art. 33.)

Article III of the treaty of August 6, 1900, between the United States and Great Britain, is as follows:

"In case of the death of any citizen of the United States of America in the United Kingdom of Great Britain and Ireland, or of any subject of Her Britannic Majesty in the United States, without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest Consular Officer of the nation to which the deceased person belonged of the circumstances, in order that the

necessary information may be immediately forwarded to persons interested.

"The said Consular officer shall have the right to appear personally or by delegate in all proceedings on behalf of the absent heirs or creditors, until they are otherwise represented."

In the consular convention between the United States and Sweden, March 20, 1911 (37 Stat. 1487), we find the following provision:

"Art. XIV. In the event of any citizen of either of the contracting parties dying without will or testament, in the territory of the other contracting party, the Consul-General, Consul, Vice-Consul-General, or the Vice Consul of the nation to which the deceased may belong, or in his absence, the representative of such Consul General, Consul, Vice-Consul-General or Vice-Consul, shall so far as the laws of each country will permit, and pending the appointment of an administrator, and until Letters of Administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and moreover, have the right to be appointed as administrator of such estate."

From the above provisions we are of the opinion that the Consul-General of Austria-Hungary becomes *ex-officio* attorney in fact for any of his nonresident nationals having no other representative in this country, and while there is a dearth of authority directly deciding this question, there are a number of cases so analagous to it in principle as to render the conclusion above announced inevitable, and such is the result deduced by the text-writers from a review of the authorities.

"A foreign consul, without specific authority, has the general right to protect the rights and property of persons of his nation, within the jurisdiction of his consulate, and he may bring suits for such purpose

without any special authority from the parties in interest. He may also interpose claims for the restitution of property belonging to his countrymen; but he cannot receive the actual restitution of the property without specific proof of the individual proprietary interest, and without specific authority from the particular individual who is entitled to it": 2 C. J. 1307, § 35. To like effect see 9 R. C. L. 157, subd. 4.

It may be remarked here that the statement, that a consul cannot receive actual restitution of property awarded to a nonresident national without specific authority from the individual entitled to it, seems to be based upon the decision in the case of *The Bello Corrunes*, 6 Wheat. 152 (5 L. Ed. 229, see, also, Rose's U. S. Notes), which arose before any of the treaties before quoted were negotiated and where it was expressly conceded by Webster, of counsel for the Consul, that actual payment of the sums claimed by the Consul on behalf of his countrymen need not necessarily be made to him—his object being to have the award paid into the registry of the court to be held for those entitled to it as their interests might thereafter appear, and such was the decree of the court. No reference was made in the arguments or in the opinion to any consular privileges or authority arising out of treaty stipulations, and the case is not in point here, where such stipulations are invoked on behalf of the Consul's authority.

When this action was commenced this government was at peace with Austria-Hungary and with Germany. In the treaty with Germany, heretofore referred to, occurs this paragraph applicable to consuls of both countries:

"Especially in cases of the absence of their countrymen such consuls shall be presumed to be their legal representatives."

The term "legal representatives" as here used can have but one meaning, namely: "Lawfully entitled to represent" the absent person. Under the "most favored nation" clause of the Austria-Hungarian treaty, this provision originally applying to Germany, became a part of the treaty with Austria-Hungary and, in our opinion, conferred full authority upon the Consul-General to commence this action in the name of the plaintiff, and in her name and for her to prosecute it to a conclusion and receive the proceeds if the plaintiff should recover judgment.

In the case of *Succession of Rabasse*, 47 La. Ann. 1452 (17 South. 867, 49 Am. St. Rep. 433), which involved the right of a delegate of the French Consul to appear and represent nonresident heirs in the settlement of a probate proceeding, the court said:

"In our view, the stipulation in this treaty puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent them as heirs. * * Our decision in this case affirms that the French heirs of this succession are to be deemed represented by the delegate of the French Consul, with the same effect as if the delegate held their power."

In *Vujic v. Youngstown Sheet & Tube Co.* (D. C.), 220 Fed. 390, it was held that the Austro-Hungarian Consul had authority by virtue of his office to sue as next friend for absent heirs, and to recover moneys due them under the Workmen's Compensation Act, on account of the death of their father.

In *Re Tartaglio's Estate*, 12 Misc. Rep. 245 (33 N. Y. Supp. 1121), the litigation arose upon the demand of the Italian Consul-General to have paid over to him the distributive shares due the nonresident widow and children of the deceased. The county treasurer, who

was custodian of the fund, refused to pay over the money upon the ground that the Consul-General had no authority to receive the fund and give a competent acquittance for the same. The clause in the treaty with Italy, relied upon by the Consul, provided that the Consuls-General "may have recourse to the authorities of the respective countries within their respective districts, whether federal or local, judicial or executive, in order to defend the rights and interests of their countrymen." The court held that the term "defend" used in the treaty should be so construed as to grant the power to proceed affirmatively; that the Consul-General had the right to demand and receive the money, and that his receipt therefor would be conclusive against the heirs. There was the same holding *In Re Fiorentino's Estate* (Sur.), 89 N. Y. Supp. 537.

Both of these cases are surrogate decisions and not authoritative, but appear to proceed upon sound lines of reasoning. There are many cases wherein the right of priority of consuls to be appointed administrators is discussed, but these proceed upon different principles and throw little light upon the present controversy. Here no one is claiming to have any authorization direct from plaintiff to proceed in the matter. Considering the disturbed state of affairs in Europe for the past four years, it appears highly improbable that the plaintiff could have been communicated with or that she could have executed and sent a formal power of attorney to the Austria-Hungarian Consul, or anyone else. In the meantime witnesses might disappear or die and the plaintiff thereby lose the benefit of their testimony. So upon the face of it, the interposition of the Consul-General would appear fairly within the line of his duties in the premises.

What would be the effect of the plaintiff appointing another attorney to represent her does not arise in this case. The writer can see no reason why she may not do so and thereby supersede the authority of the Consul-General, or his successors; but this would be at present a moot question and need not be further discussed. The contention of counsel for respondent is to the effect that the law gives the right of action to the mother, and that contention is correct. His further contention that, because the Consul-General caused this action to be instituted the mother has not instituted it, rests wholly upon the assumption that the Consul-General is not the agent of the mother, and having shown, as we believe, that by virtue of the treaty he is such agent, respondent's contention fails.

It follows that the order of the Circuit Court, staying the proceedings, must be set aside and the cause remanded to the Circuit Court, with directions to proceed in a manner not inconsistent with this opinion.

REMANDED.

BURNETT, BENSON and HARRIS, JJ., concur.

BURNETT, J., Concurring Specially.—Under the original Constitution of this state the Supreme Court has jurisdiction to revise only final decision of the Circuit Courts: Oregon Const., Art. VII, § 5. Although the amendment of this article adopted by the plebiscite of November 8, 1910, permits legislation changing this rule, none has yet been enacted. The order staying proceedings in this case until the attorneys appearing for the plaintiff should produce authority to act for her was purely interlocutory and not final. There is nothing about it which would have prevented the plaintiff from going on with the trial of the action, and

pursuing it to final judgment the next day or at any subsequent time, represented by the same or other attorneys or appearing in person, provided of course the authority of the attorneys so to act was made to appear. The order does not determine any issue in the case or prevent a final judgment in the action within the meaning of Section 548, L. O. L., as amended by Chapter 88, Laws 1915, defining appealable orders. Although erroneous, it is not every determination of an inferior court that is appealable. Appeal does not lie as of right in all cases. It depends entirely upon the statute allowing it and is not to be extended to orders not within the enabling statute. The order under consideration is not one from which an appeal will lie, because it is not final. We are confronted with a moot question only. On the hypothesis that this court has jurisdiction to review such an order, which I do not concede, I concur in the reasoning of Mr. Chief Justice McBRIDE to the effect that a foreign consul has presumptive authority to represent his nonresident countrymen in the courts of this country, my contention being that the question is not properly before us.

Motion to dismiss appeal denied conditionally September 21, 1918.

Argued on the merits September 30, affirmed October 14, 1919.

McKISSICK v. McKISSICK.

(174 Pac. 721; 184 Pac. 272.)

Appeal and Error—Undertaking—Void Service.

1. Where appellant's attorney attempted to serve the undertaking upon respondent's attorney by leaving a copy at his supposed residence which in fact was not his residence, the service was void.

Appeal and Error—Undertaking—Void Service—Mistake.

2. Where appellant's attorney in good faith attempted to serve the undertaking upon respondent's attorney by leaving a copy at his supposed residence, but failed to make good service because latter did not in fact live in such residence, the court, under Section 550, subdivision 4, L. O. L., may permit service to be made on such terms as may be just.

Divorce—Decisions Reviewable—Order Modifying Decree Awarding Custody of Infants.

3. An order, though discretionary, granting or refusing to grant a change in the custody of infants, is appealable.

ON THE MERITS.**Divorce—Order Refusing Modification of Decree as to Custody of Child Reviewable.**

4. Order refusing motion to modify decree as to custody of child, necessarily based on matters occurring after divorce decree, which under Section 756, L. O. L., is conclusive as to matters occurring before its rendition, is reviewable.

Divorce—Party Seeking Modification of Decree as to Custody of Child has Burden of Proof.

5. The defeated party in divorce seeking modification of decree as to custody of child has the burden of showing something by reason of which the established status should be disturbed.

Divorce—In Awarding Custody of Children Their Welfare Paramount.

6. It is the cardinal principle in awarding custody of children of divorced persons that the interest and welfare of the children are paramount to the rights and privileges of the parents.

Divorce—On Custody Awarded Mother, Placing Children in Home With Grandparents Proper.

7. The mother to whom decree of divorce awards custody of child is within her rights and duty in furnishing it with a suitable home and surroundings with her parents; she finding it necessary to take employment elsewhere to support herself.

Divorce—Modification of Decree Awarding Custody of Children to Mother Properly Denied.

8. The motion of divorced father to modify decree awarding custody of child to its mother is properly denied; he not showing that mother was unfit to have the care of it, or that its condition would be improved over its present surroundings.

From Multnomah: ROBERT G. MORROW, Judge.

On motion to dismiss appeal.

DENIED CONDITIONALLY.

Mr. J. Le Roy Smith, for the motion.

Mr. L. G. English and *Mr. H. L. Ganoe*, *contra*.

McBRIDE, C. J.—This is a motion to dismiss an appeal, the alleged grounds thereof being (1) that there was no service of a copy of the undertaking upon the respondent, and (2) that the order appealed from was not an appealable order, being a matter wholly within the discretion of the trial court.

It appears from the record that upon the trial and final disposition of a divorce suit begun by plaintiff against the defendant, the court awarded the custody of a minor child of the parties to the plaintiff. Subsequently, defendant applied to the court for a modification of that portion of the decree giving the mother the custody of the child. His application being denied, he appealed to this court. Being unable to find plaintiff's attorney at his office, defendant attempted to serve the undertaking by leaving a copy at his supposed residence. Plaintiff's attorney did not in fact reside at the place indicated and the service was void. We are of the opinion that the appellant's attorney acted in good faith in attempting to serve the undertaking as recited, and that the case comes fairly within the provisions of Section 550, subdivision 4, L. O. L., which is as follows:

“From the expiration of the time allowed to except to the sureties in the undertaking, or from the justification thereof if excepted to, the appeal shall be deemed perfected. When a party in good faith gives due notice as hereinabove provided of an appeal from a judgment, order, or decree, and thereafter omits, through mistake, to do any other act (including the filing of an undertaking as provided in this section) necessary to perfect the appeal or to stay proceedings,

the court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just."

Such is the holding in the case of *Dowell v. Bolt*, 45 Or. 89 (75 Pac. 714). In the present case appellant has asked leave to file an additional undertaking. We are of the opinion that an appeal lies from an order of the court granting or refusing to grant a change in the custody of infants: 14 Cyc. 814; *Greenleaf v. Greenleaf*, 6 S. D. 348 (61 N. W. 42).

The case of *Pittman v. Pittman*, 3 Or. 472, bears by analogy upon the matter here under consideration. In that case the defendant obtained a decree of divorce, which granted her the custody of a minor child and the appeal was from that portion of the decree only. It was held that an appeal would lie. Even if, as contended by respondent here, the order as to the custody of the child was a matter within the sound discretion of the court, that fact would not bar an appeal, as the appellant would still have the right to obtain the jurisdiction of this court as to whether or not such discretion had been abused.

The motion to dismiss will be denied, conditioned that appellant within twenty days from the date of this order, serve and file in this court a sufficient undertaking on appeal. In default of filing such undertaking within the time limited the appeal will be dismissed.

DENIED CONDITIONALLY.

Argued September 30, affirmed October 14, 1919.

ON THE MERITS.

(184 Pac. 272.)

Department 1.

On November 7, 1917, at the suit of plaintiff, the Circuit Court of Multnomah County granted her a divorce from the defendant and gave her the care and custody of the minor daughter of the parties until the further order of the court, upon condition that the defendant may have the privilege of visiting the child at reasonable times and places, and with the further provision that he might have the child visit him at Portland, Oregon, with reasonable frequency by providing a safe and proper means of transportation and accommodations while in his care. By the decree he was required to pay to the plaintiff a fixed sum as alimony and, further, to pay fifteen dollars per month until further order of the court, for the maintenance and support of the child. On March 13, 1918, he filed a motion in the Circuit Court for a modification of the decree relieving him from paying any further alimony, costs or attorneys' fees as provided in the decree, and that he be given the care, custody and control of the minor child. On March 30, 1918, the Circuit Court heard the application and denied it. From this order the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. H. L. Ganoe* and *Mr. L. G. English*, with an oral argument by *Mr. Ganoe*.

For respondent there was a brief and an oral argument by *Mr. J. Le Roy Smith*.

BURNETT, J.—4. Notwithstanding the contention of the defendant, this is an appealable order, as held in another feature of this same case reported, *ante*, p. 644 (174 Pac. 721). The court had jurisdiction of the persons and subject matter involved in this suit and rendered a decree respecting the custody of the child. This was final and conclusive as to all matters occurring before the rendition of the decree, for Section 756, L. O. L., speaking of the decree of a court having jurisdiction as aforesaid, says:

“In case of a judgment, decree or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a deceased person, or in respect to the personal, political or legal condition or relation of a particular person, the judgment, decree or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person.”

Nevertheless, as stated by Mr. Chief Justice MOORE in *Gibbons v. Gibbons*, 75 Or. 500 (147 Pac. 530):

“The welfare of these infants is paramount to the rights of any person. * * The court granting the decree of divorce is authorized to modify it at any time so as to provide for the care, custody and support of the minors, and may impose such burden upon either or both parties to the suit.”

5. The motion before us is in the nature of a new proceeding based necessarily upon matters occurring since the former decree. We cannot, in the absence of an appeal, go behind the former adjudication and make gleanings from the evidence upon which the suit was there determined or the custody of the child adjudicated. The court then determined, with the evidence before it, that considering the best interests of the child the mother was the proper custodian and that

she was best fitted for that purpose. If the defendant would procure a new adjudication on that subject, different from the former one, he must assume the burden and show either that the plaintiff is not a suitable custodian of her own child, or that the best interest of the latter requires that its care and custody be given to him. In other words, the burden is upon him to disturb the status established by the original decree.

In his affidavit supporting his motion he says that the plaintiff took the child to Ashland but that he has no knowledge about what disposition was made of it or in whose keeping it has been placed. He then states that about January 1, 1918, the plaintiff returned to Portland and since about the twentieth of that month has been living and cohabiting with one Frank W. Moore, as husband and wife, residing at 358 Thirteenth Street in that city. He alleges upon information and belief that the plaintiff and Moore are husband and wife and that Moore is able to care for and support her. Further deposing on information and belief, he avers that the plaintiff has abandoned the child and has shown by her acts since the filing of the decree that she is not a fit person to have the custody of the child; and, lastly, that he himself is ready, able and willing to support it. He then produces the affidavit of Mrs. Rankin, the keeper of the rooming-house at the address named, to the effect that about January 20, 1918, a man and woman giving the name of Mr. and Mrs. Frank W. Moore and representing themselves to be husband and wife, rented a single room with but one bed and were registered in a book kept by the affiant as a register of all tenants, and that they occupied said room continuously until March 12th. She further relates in substance that on the last-named date someone inquired by telephone for Mrs. Moore, whom

she called from her room to the telephone; that later in the afternoon three men called and inquired for Mrs. Moore and she let them inspect the register referred to. Then one of the men, who introduced himself as Mr. McKissick, produced two photographs of the woman, which she recognized as pictures of Mrs. Moore.

Douglas Lawson gave his affidavit to the effect that on March 12th he inquired by telephone for Mrs. Moore and when she came to the instrument speaking, he recognized the voice as that of the plaintiff, Mrs. McKissick. He further states that afterwards on the same date the defendant and he met the plaintiff, whereupon the former addressed her as "Mrs. Moore" and she replied, "I am not Mrs. Moore. I am Mrs. McKissick." He also narrates the circumstance of going to the rooming-house and his conversation, and the exhibition of the photographs as stated.

Another affiant gives a statement about the interview with Mrs. Rankin and the inspection of the register. There are other affidavits about inquiring of other individuals for the address of Mr. and Mrs. Moore, and information given in answer to such inquiry although not in the presence of the parties. An insurance agent deposes about the application of Frank W. Moore for insurance, representing himself to be a married man, residing at the address of Thirteenth Street.

The plaintiff filed her counter-affidavit, denying categorically that she had ever occupied any room with Moore or cohabited with him at any time or place. She complains that almost continually since they separated, and ever since the divorce, the defendant has followed and annoyed her so that she was compelled to change her place of residence and that on account

of being afraid of him she had some of her fellow-employees accompany her and also had Moore act as her escort on numerous occasions. She says that her friends frequently gave false addresses respecting her residence when he would inquire of them for her. In substance she says the arrangements for the room on Thirteenth Street were made for the purpose of throwing the defendant off her track and that she never gave any other name than McKissick except as a ruse to elude him. She states that the defendant has never inquired concerning the child, has never shown any interest whatever in her and that during all the child's life the plaintiff's parents and herself have had the entire care and custody of the infant. The plaintiff claims that when she came to Portland she did not know how long she would remain, and that owing to her ill health she has not been able to spare the money to bring the child to Portland, and consequently she left her with her father and mother until she could decide what she should do.

Another affiant speaks very highly of the plaintiff's parents and of their ability to take care of the child, whom they have had almost all of her life. She speaks in the warmest terms of the plaintiff's attachment to the child and of the plaintiff's good character.

Moore states that he made the application for insurance at the request of the defendant himself and that it was a fake application. He expresses contrition for his dissimulation in the matter and states that as soon as the plaintiff began her work at the Hazelwood store the defendant began shadowing the place and followed and accosted the plaintiff on the streets, frequently stopping and annoying her, so that to avoid him she often had some of the girls, her fellow-employees, to accompany her. The defendant never re-

ferred to the child or inquired about its welfare. Moore denies that he ever cohabited with or stayed at the room of the plaintiff and says that he never knew her to conduct herself otherwise than as a true and virtuous woman. He says that for some time from January 20th he was confined to his home at 427 Salmon Street by an attack of fever. In this he is corroborated by the owner of the Salmon Street address, who declares that Moore had not resided at any other address during the time mentioned in the affidavit of Mrs. Rankin.

Mrs. Rankin supplies an affidavit on behalf of the plaintiff, denying that she kept a register at her house. She declares that she supposed that matter had been stricken from her affidavit which she was asked to sign on behalf of the defendant; that Moore was on the premises only a few times after renting the room and that she knew Mrs. McKissick was ill for some time while rooming there. This is substantially the showing made in the matter before us.

6. We remember as the cardinal principle that the best interest and welfare of the child are paramount to the rights or privileges even of the parents. By *innuendo* the defendant charges his former wife, the mother of his child, with unchaste conduct. He does not pretend to give evidence of any act *in flagrante delicto*. The landlady, it is true, says that Moore and a woman represented as his wife occupied her room from January to March. The effect of that affidavit is greatly weakened by the subsequent declaration of the same affiant, denying important statements made therein. Moreover, both Moore and the plaintiff deny any meretricious relations between them. The plaintiff had divorced the defendant and owed him no duty.

She had a right to keep company with Moore and to receive his legitimate attention. From the weight of the testimony, we conclude that it is much such a case as described by Mr. Justice McBRIDE in *Matthews v. Matthews*, 60 Or. 451 (119 Pac. 766), thus:

"It appears that the plaintiff is not an adultress and that she is a woman of good moral character who has been guilty of certain indiscreet conduct which age and experience will no doubt correct."

7. So far as the custody of the child is concerned, the decree has given it to the plaintiff. She is not bound to have it in her arms or by her side continuously. She is within her rights and duty if she provides for it a suitable home and surroundings. There is no dispute that she has done this in leaving the child with its grandparents, who have had the care of it almost its entire life. The defendant, although the affidavits on his side of the case describe him as a clean, moral and truthful gentleman, fit and proper to have the care and custody of his minor child, has not shown that he could do better than to leave it in the care of some other person. It cannot be said that the plaintiff has abandoned the child. Even if the defendant had the little one, it might become necessary to send her to some boarding-school or to place her in some family where she could have the benefit of home surroundings. It seems that the plaintiff found it necessary to take employment to support herself, and it is far better for the interest of the child that it should be with its own people, who know it so well, than to be a burden upon its mother for its personal care, much to the detriment of both mother and child.

8. The defendant, who is the moving party, has not shown that the mother is unfit to have the care of the

child, or that the latter's condition would be improved over its present surroundings.

The court was right in denying the motion and its decree is affirmed. AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued September 23, reversed October 14, 1919.

FARMERS & FRUIT-GROWERS' BANK v.
DAVIS.

(184 Pac. 275.)

Appeal and Error—Sufficiency of Notice of Appeal.

1. Under Section 550, subdivision 1, L. O. L., notice of appeal specifying the court in which the judgment was rendered, giving the names of the parties, and notifying defendant and his attorney that plaintiff appealed to the Supreme Court from the judgment for defendant and against plaintiff, entered in a named court on a given date, the undertaking on appeal served on defendant reciting that the appeal was to the Supreme Court, *held* sufficient.

Appeal and Error—Extension of Time for Filing Transcript not Beyond Next Term.

2. Under Section 554, subdivision 2, L. O. L., where the next term of the Supreme Court after an appeal perfected January 16th commenced March 4th and ended October 7th, when the next term began, the time for filing transcript was not extended beyond the next term by orders the last of which prescribed the time as until August 5, 1918.

Exceptions, Bill of—Sufficiency of Bill Containing Transcript of All the Evidence.

3. Bill of exceptions portraying all proceedings of the trial, and certified to by the trial judge, to which a transcript of all the evidence was attached, *held* sufficient.

Judgment—No Necessity to Plead Estoppel by Judgment not Relied on as Bar.

4. The rule that an estoppel by judgment to be available must be pleaded does not apply where the judgment, instead of being relied on as a bar to the action, is sought to be introduced in evidence merely as conclusive of some particular fact previously adjudicated.

Pleading—Sufficiency of Complaint in Replevin Alleging Ownership and Right of Possession.

5. In replevin for possession of a bond, the complaint alleging that plaintiff was the owner and entitled to possession was sufficient without amendment; plaintiff not being required to plead its evidence.

Judgment—Effect as Estoppel in Subsequent Litigation.

6. While the doctrine of the effect of a judgment as an estoppel in a subsequent action is limited to matters involved in the litigation, it is generally held to be equally applicable whether the point decided is the ultimate vital point, or only incidental, if necessary to decision of the ultimate point.

Judgment—Conclusiveness in Subsequent Litigation as to Matters Necessarily Though not Directly Determined.

7. Judgment in a prior suit is deemed final and conclusive in subsequent litigation between the parties or their privies as to a matter necessarily determined or implied in reaching the final judgment, though no specific finding may have been made thereon, and even though it was not raised as an issue by the pleadings.

Judgment—Conclusiveness as to Person Standing in Shoes of Parties Defendant.

8. Judgment in action by payee of note against the makers held conclusive, in the payee's action to recover a bond from the person holding it in the right of the makers, as to whether bonds had been paid for by the payee, so that it acquired title to them.

Evidence—Admission by Maker of Note Competent Against Stakeholder Claiming Bond for Maker.

9. Any admission or claim by makers of a note in regard to the point whether certain bonds were received by the payee bank in part payment held admissible, as against a disinterested stakeholder claiming title to a bond against the bank for the makers.

From Jackson: FRANK M. CALKINS, Judge.

Department 2.

Action by the Farmers & Fruit-growers Bank against F. Roy Davis. From judgment for defendant, plaintiff appeals. Reversed and rendered.

For appellant there was a brief and an oral argument by *Mr. Porter J. Neff*.

For respondent there was a brief and an oral argument by *Mr. W. E. Crews*.

BEAN, J.—This is an action for the possession of one bond of the Medford Printing Company of the par value of \$100. There are seven other like bonds in the same condition. The complaint is in the usual

form alleging ownership and right of possession. The answer denies the same. The cause was tried by the court without the intervention of a jury. Findings of fact were made and a judgment passed in favor of defendant from which judgment plaintiff appeals.

The facts out of which the case arose are substantially as follows: On May 4, 1910, J. F. Reddy and John R. Allen gave the plaintiff their promissory note for \$3,487. Thereafter, plaintiff commenced an action on the note and attached certain property belonging to Allen and Reddy. In order to obtain the release of the attachment and a dismissal of the suit, J. F. Reddy and Mary F. Reddy gave to plaintiff their note for \$3,662.75, being the amount of the Allen-Reddy note and interest and costs of the action. This note was held as collateral for the original Allen-Reddy note. Payments were made and credited upon it from time to time, and it was renewed at different times. In the meantime John R. Allen had made an assignment of his property to certain trustees for the benefit of his creditors. Among the property so assigned were certain bonds in the Medford Printing Company, of which those in controversy were a part. On December 12, 1911, the trustees of John R. Allen being unable to sell these bonds advantageously, distributed the bonds among the creditors as a dividend on the basis of their value being 90 per cent of par. Plaintiff as its dividend on the Allen-Reddy note received \$800 par value of these bonds, 90 per cent of which is \$720, and \$26.43 in money to equalize its dividend. Plaintiff credited the cash payment on the collateral note of Reddy and wife, but held the bonds claiming the same to be collateral security without crediting the value of the bonds. In September, 1914, plaintiff commenced an action against Reddy and wife on the last renewal of

their collateral note for \$3,338.66, dated April 24, 1914, with interest at 8 per cent per annum from date, asserting no part thereof had been paid except \$24, paid July 7, 1914. Plaintiff claimed \$350 as reasonable attorney's fees in the action. There was no controversy in regard to the amount of the attorney's fees. The Reddys answered in that action setting up two defenses. The only one here material being that the original Allen-Reddy note had been paid. A trial was had upon the issues in the Circuit Court. A complete transcript of the proceedings of that trial is attached to the bill of exceptions. Upon the issue of the payment of the original Allen-Reddy note, the defendants Reddy and wife claimed and introduced testimony tending to show that the receipt by plaintiff in that case, and the plaintiff here, of the \$800 par value of the Medford Printing Company bonds was a payment on the Allen-Reddy note at the agreed value of \$720. Plaintiff opposed the allowance of this credit claiming that the bonds were held as collateral to the notes and not as payment thereon. The issue thus raised was submitted by the court to the jury in the following language:

"Now the evidence that was offered tends to show that a certain amount was received in money on the indebtedness and a certain amount in bonds of the Tribune Printing Company. I say, that there was on the indebtedness, I will withdraw that and say that the evidence tends to show that a certain amount of money was paid and a certain amount of bonds were given as a result of this trust agreement—that is the dividend that was coming to the plaintiff on this trust agreement. The defendant contends that both the money that was paid and the value of the Tribune bonds should be indorsed on this note as payment or on this indebtedness as payment. The plaintiff, on the other hand, contends that the understanding was

that the money received should be indorsed on the indebtedness but that the Tribune bonds that were received should be held and any moneys received from them should be indorsed on the indebtedness and whenever the note was paid in full, that is, the note that is sued upon here is paid in full, that if the bonds had not been paid that they should be turned back to Dr. Reddy.

"There is a direct issue on that question and it will be for you to decide whether or not the value of the bonds should be indorsed on the indebtedness or should be disregarded by you. If the plaintiff's contention is true that they simply hold the bonds as collateral for the notes and that the bonds had not been sold or reduced to cash they should not be indorsed on the note. If the defendant's contention is true that the bonds were accepted as cash payment then of course that amount should be deducted from the amount due on the note."

No other evidence was offered by the defendants Reddy tending to show any other payment ever having been made upon the notes which had not been credited. The jury returned the verdict for \$3,210.17, including interest and attorney's fees, for which judgment was entered on February 29, 1916. Upon the trial of the present case, the plaintiff offered in evidence the record in the former action on the note in the case of *Farmers & Fruit-growers' Bank v. J. F. Reddy and Mary F. Reddy*, for the purpose of showing that the verdict and the judgment established the fact as between plaintiff and the Reddys that the bonds were received by the bank as absolute payment on the Allen-Reddy note and on the collateral note of Reddy and wife, and that credit was given therefor by the verdict of the jury, and judgment rendered thereon.

After the rendition of the judgment in the action on the note and for the purpose of inducing the defend-

ants to pay the judgment, plaintiff entered into a stipulation with the Reddys in the following language:

"It is hereby agreed between Mary F. Reddy and J. F. Reddy, parties of the first part, and Farmers and Fruit-growers' Bank, parties of the second part:

"That the judgment held by the Farmers and Fruit-growers' Bank against the Reddys shall be paid.

"Two: That the bonds of the Medford Printing Company in the amount of eight hundred dollars shall be delivered by the Bank to F. Roy Davis, and that thereupon the Farmers and Fruit-growers' Bank shall commence an action in replevin for the said bonds against said Davis; that in said replevin action said Davis shall have the right to set up as defense any right or claim which the Reddys have to the bonds and employ W. E. Crews to defend the case without cost to F. Roy Davis.

"It is the intention that in said replevin action the respective rights of the Farmers and Fruit-growers' Bank and the said Reddy shall be determined, the Farmers and Fruit-growers' Bank assuming that burden of the plaintiff and that the transfer of the bonds to said Davis and the payment of the judgment by said Reddy shall in no manner affect the rights of either party to said bonds.

"It is further agreed that this agreement shall in no way legally affect the replevin action on trial or the manner of its appeal."

Pursuant to this stipulation the bonds were turned over to the defendant Davis by plaintiff. Formal demand for their return was made and refused, and this action was commenced. Some preliminary questions are submitted in a rather irregular way. They should properly have been presented before the time of the argument upon the merits.

Rule 23 of this court, 89 Or. 720 (173 Pac. x), of date September 2, 1918, provides among other things that—

"All motions must be filed within ten days after a party or his attorney obtains knowledge of an alleged failure of the adverse party or his attorney to comply with the requirements of the statute or with the rules of this court, and unless so filed all defects, except objections to the jurisdiction of the court, will be taken as waived by the moving party."

1. In the brief of respondent, it is urged that the notice of appeal is insufficient to confer jurisdiction for the reason it does not sufficiently describe the judgment appealed from or the court appealed to. The notice of appeal specifies the court in which the judgment was rendered, gives the name of the parties to the action, notifies the defendant and his attorney that the plaintiff "appeals to the Supreme Court from the judgment in the above-entitled action in favor of defendant and against plaintiff, entered in the above-named court on November 17, 1917, and from the whole of said judgment."

Subdivision 1 of Section 550, L. O. L., provides that—

"Such notice shall be sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party or his attorney that an appeal is taken to the supreme or circuit court, as the case may be, from the judgment, order, or decree, or some specified part thereof."

It was held in *Fraley v. Hoban*, 69 Or. 180 (133 Pac. 1190, 137 Pac. 751), that a notice of appeal which correctly specifies the court in which the judgment was rendered, gives the names of the parties to the action, the date of the judgment, and informs the adverse party that an appeal from the judgment has been taken, is sufficient without any other description. And in *Holton v. Holton*, 64 Or. 290 (129 Pac. 532, 46

L. R. A. (N. S.) 779), it was held that a notice of appeal which does not specify to what court the appeal is taken, nor fully describe the decree, is sufficient when by reference to the undertaking the missing particulars are supplied: See, also, *MacMahon v. Hull*, 63 Or. 133 (119 Pac. 348, 124 Pac. 474, 126 Pac. 3); *Raiha v. Coos Bay Coal & Fuel Co.*, 77 Or. 275 (143 Pac. 892, 149 Pac. 940, 151 Pac. 471).

In the present case, the undertaking upon appeal, which was served upon the defendant, recites that the appeal of the above-entitled action is to the Supreme Court of the State of Oregon. The notice of appeal substantially conforms to the statute and was sufficient to inform the respondent and his counsel that an appeal was to be taken from the judgment mentioned therein. The point is not well taken.

2. A question is also raised by respondent in his brief in regard to the extension of the time for filing the transcript. The appeal was perfected January 16, 1918. Orders were made from time to time by the trial court extending the period for filing the transcript. The last order prescribed such time as until August 5, 1918. Section 554, subdivision 2 (See Laws 1913, p. 619), provides for an order enlarging the time for filing the transcript upon appeal, but such order shall not extend the time for filing the transcript beyond the term of the Supreme Court next following the appeal. The next term of this court after the appeal commenced on March 4, 1918, and ended October 7, 1918, when the next term began, hence the time for filing the transcript was not extended beyond the next term of this court. The objection is not well taken: See *Emery v. Brown*, 63 Or. 264 (127 Pac. 682). It is claimed on behalf of respondent that the time al-

lowed for filing brief would in effect put the case over the October term, but this cannot be considered.

3. Counsel for respondent asks that the bill of exceptions be stricken out for the reason that it contains a transcript of all the evidence and all the proceedings had at the trial. The bill of exceptions portrays all of the proceedings of the trial of the cause, and is certified to by the trial judge. A transcript of all of the evidence is attached thereto. Under the rule announced and fully discussed in *Malloy v. Marshall-Wells Hardware Co.*, 90 Or. 303 (173 Pac. 267, 175 Pac. 659, 176 Pac. 589), by Mr. Justice McCAMANT, and affirmed in an opinion by Mr. Justice HARRIS, relating to the bill of exceptions, that in the present case is sufficient. Further discussion is unnecessary and would only consume space.

Considering the case on the merits—a careful computation of the interest on the note sued upon in the former action plainly shows that the \$720, the value of the bonds in question, was credited by the jury upon the note. There was a slight discrepancy in the figures, but it is not material. Objection was made by counsel for defendant to the introduction of the record of the former judgment as evidence for plaintiff which was sustained by the court. It was admitted temporarily, but the certificate of the trial judge states that the objection to the introduction of that record was sustained for the reason that the judgment in the former action was not pleaded by plaintiff as an estoppel or bar to the present action, to which ruling counsel for plaintiff duly saved an exception. Plaintiff asked permission to file an amended complaint setting up the estoppel which was denied by the court over the exception of counsel for plaintiff. This is the main question for determination in this case.

4. The rule that an estoppel by judgment to be available must be pleaded does not apply where as in the case at bar the judgment instead of being relied upon in bar of the action, is attempted to be introduced in evidence merely as conclusive of some particular fact formerly adjudicated. In such case, it need not be pleaded in order to make it conclusive. The rule is stated in *Swank v. St. Paul City Ry. Co.*, 61 Minn. 423 (63 N. W. 1088), as follows:

"A former judgment on the same cause of action, being a complete bar to a second action, must always be pleaded by way of defense: *Bowe v. Minnesota Milk Co.*, 44 Minn. 460 (47 N. W. 151). But a former judgment is no bar to a second suit upon a different cause of action. It merely operates as conclusive evidence of the facts actually litigated in the first action, and upon the determination of which the finding or verdict therein was rendered, and need not be pleaded any more than any other evidence. In such a case it is proper for a party to plead his cause of action or defense in the ordinary form, leaving the judgment to be used in evidence to establish his general right."

In *Krekeler v. Ritter*, 62 N. Y. 372, 374, the court uses the following language:

"The record of the Superior Court was not offered or received in evidence in bar of the action, but merely as evidence of the fact in issue. Had it been offered as constituting a bar, or as an estoppel to the action, it would have been inadmissible, not having been pleaded as a defense. (Citations.) But as evidence of a fact in issue it was competent although not pleaded like any other evidence, whether documentary or oral. A party is never required to disclose his evidence by his pleadings. The evidence was competent to disprove a material allegation of the complaint traversed by the answer. As evidence it was conclusive as an adjudication of the same fact, in an action between the same parties."

5. The complaint alleges that the plaintiff is the owner of the property in question and entitled to the possession thereof. We think it is sufficient without amendment. It was not required to plead its evidence. It should be noted that the present defendant is in privity with and stands in the shoes of J. F. Reddy and Mary F. Reddy, the defendants in the former action as to the ownership of the bonds. Hence he can claim only the same right to the bonds that the Reddys have. This is plainly agreed by the stipulation set forth above. The present action is upon a different claim or demand from the former action. The general rule is stated in 15 R. C. L., Section 450, page 973, as follows:

“When the second action between the same parties is upon a different claim or demand, or cause of action, it is well settled that the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined. This rule holds true whether the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*. In all cases it should appear that the first judgment determined the actual question at issue between the parties, and that the precise question was raised and determined in the former suit. On the other hand it is equally well settled that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court, and that where some controlling fact or question material to the determination of both actions has been determined in a former suit, and the same fact or question is again at issue between the same parties, its adjudication in the first will if properly presented be conclusive of the same question in the latter suit, without regard to whether the cause of action is the same or not, or whether the second suit

involves the same or a different subject matter, or whether or not it is in the same form of proceeding."

6, 7. The law applicable is stated in substance as follows: While the doctrine of the effect of a judgment as an estoppel in subsequent action is limited to matters involved in the litigation, it is generally held to be equally applicable whether the point decided is, of itself, the ultimate vital point, or only incidental, if still necessary to the decision of that point, and a judgment in a prior suit is deemed final and conclusive in subsequent litigation between the parties, or their privies, as to those matters necessarily determined or implied in reaching the final judgment, although no specific finding may have been made in reference thereto, and even though it was not raised as an issue by the pleadings in the former action. If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties or their privies, and, if a judgment necessarily presupposes certain premises, they are as conclusive as the judgment itself, for the judgment is an adjudication on all matters which are essential to support it. Although there are decisions to a different effect, it has been said that the foregoing principles are universally applied, no matter how much injustice may be done by their application to a particular case: 15 R. C. L., § 451, p. 976. Citing among other authorities, *Short v. Taylor*, 137 Mo. 517 (38 S. W. 952, 59 Am. St. Rep. 508); *Wells v. Boston etc. R. R. Co.*, 82 Vt. 108 (71 Atl. 1103, 137 Am. St. Rep. 987); *Bleakley v. Barclay*, 75 Kan. 462 (89 Pac. 906, 10 L. R. A. (N. S.) 230); *Washington etc. Steam Packet Co. v. Sickles*, 5 Wall. 580

(18 L. Ed. 550, see, also, Rose's U. S. Notes); *Redden v. Metzger*, 46 Kan. 285 (26 Pac. 689, 26 Am. St. Rep. 97); *Shelby v. Creighton*, 65 Neb. 485 (91 N. W. 369, 101 Am. St. Rep. 630); *Reed v. Douglas*, 74 Iowa, 244 (37 N. W. 181, 7 Am. St. Rep. 476); *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498 (33 Am. Rep. 655). See, also, 23 Cyc., pp. 1431, 1524, and cases cited under note 71; *Stillwell v. Hill*, 87 Or. 112 (169 Pac. 1174), and cases there cited.

8, 9. In effect the payment of the value of the bonds in question upon the Reddy note was embraced in the allegations of the defendant's answer and put in issue in the former action. Circumstances in relation thereto were disclosed by the testimony and the question submitted to the jury under proper instructions, and passed upon by that tribunal, and became a part of the judgment: Freeman on Judgments (3 ed.), § 284. The defendant Davis ought not to be permitted in the present action, to claim on behalf of Dr. and Mrs. Reddy that the bonds referred to were not paid for by the bank and thereby became its property, contrary to the claim of the Reddys whom he represents, and in contravention of the verdict of the jury and the judgment of the court in the former action. Whatever might be the technical holding in regard to the former judgment, there is another reason why the record of the former case should be considered. It plainly shows that the Reddys who participated in the trial of that action asserted that the bonds were received by the bank in part payment of their note. Any admission or claim by them in regard to the matter would be admissible as against the present defendant who is an uninterested stake-holder claiming title to the bonds for the Reddys.

The record submitted in this case plainly shows that the plaintiff is the owner of and entitled to the possession of the bond described in the complaint. Therefore, pursuant to Section 3, Article VII, Constitution of Oregon, as amended November 8, 1910, the judgment of the lower court will be reversed and one entered here in favor of plaintiff as prayed for in its complaint.

REVERSED. JUDGMENT RENDERED.

McBRIDE, C. J., and JOHNS, J., concur.

BENNETT, J., Specially Concurring.—In this case I concur with the opinion of Mr. Justice BEAN as to the admissibility of the judgment transcript of the previous trial in the action by the plaintiff against Allen and Reddy, but I think the case should be reversed and remanded for a new trial. I do not wish to concur in the implied construction of Section 3 of Article VII of the Constitution of Oregon, adopted in 1910.

Argued April 23, affirmed October 14, 1919.

LADD & TILTON BANK v. MITCHELL.

(184 Pac. 282.)

Mortgages—What Constitutes "Purchase-money Mortgage" Entitled to Priority of Liens.

1. Generally, mortgage executed by purchaser contemporaneously with acquirement of legal title, or afterwards as part of same transaction, is a "purchase-money mortgage," regardless of whether executed to vendor or third person, and entitled to preference as such over all other claims or liens arising through the mortgagor though prior in point of time.

Mortgages—What Constitutes "Mortgage to Secure Payment of the Balance of the Purchase Price."

2. A mortgage executed to "secure payment of the balance of the purchase price," within Section 426, L. O. L., providing that upon foreclosure of such mortgage, mortgagee shall not be entitled to deficiency

judgment against purchaser, is a mortgage given concurrently with a conveyance of land, by purchaser to vendor, on the same land, to secure the unpaid balance of the purchase price, and a mortgage executed by purchasers to vendor's mortgagee in consideration of the latter's release of the land purchased from its mortgage is not within the statute.

From Multnomah: GEORGE W. STAPLETON, Judge.

In Banc.

This is a suit by Ladd & Tilton Bank against defendants McKinley Mitchell and wife and Lewis-Wiley Hydraulic Company to foreclose a first mortgage on certain real property. The complaint is in the usual form and asks that in the event the amount received upon the sale of the real property be insufficient to satisfy the demand of plaintiff, it have judgment against defendants Hattie Mitchell and McKinley Mitchell, and each of them, for the deficiency. The defendants Hattie Mitchell and McKinley Mitchell filed an answer admitting the allegations of the complaint, and setting up certain facts which they claim exempt them from the operation of any judgment for any balance that may remain after the proceeds of the sale of the real property described in the mortgage.

The trial court rendered a decree in favor of plaintiff, and the Mitchells appeal from that portion of the judgment and decree which is as follows:

"That if, after the application of the proceeds of sale of said real property in the manner aforesaid, any deficiency remains upon the judgment herein rendered and obtained by plaintiff, that plaintiff have execution against the defendants Hattie Mitchell and McKinley Mitchell, or either of them, and against the property of them or either of them, to satisfy in whole or in part any such deficiency."

The cause was submitted upon the following stipulation of facts:

"It is hereby stipulated by and between the parties hereto, by and through their respective attorneys of record, that the following facts are to be considered as true on the trial of the above entitled case:

"1. That on and prior to the 3d day of October, 1912, Lewis-Wiley Hydraulic Company, an Oregon corporation, owned and held absolute title to lots two (2) and three (3) in block ten (10), Westover Terraces, an addition to the City of Portland, Multnomah County, Oregon, according to the duly recorded maps and plats thereof, and that on or prior to said date, to wit, the 3d day of October, 1912, Lewis-Wiley Hydraulic Company had borrowed certain moneys from Ladd & Tilton Bank, and as security therefor had executed a blanket mortgage unto Ladd & Tilton Bank on all of the property owned by Lewis-Wiley Hydraulic Company, including in said blanket mortgage the property above described, to wit, lots two (2) and three (3) in block ten (10) Westover Terraces aforesaid. That said blanket mortgage was to secure Ladd & Tilton Bank for the repayment of moneys actually advanced by the said Ladd & Tilton Bank to said Lewis-Wiley Hydraulic Company and used by said Lewis-Wiley Hydraulic Company for its corporate purposes; the said blanket mortgage so executed by the Lewis-Wiley Hydraulic Company was not in fact a purchase money mortgage and said property was never owned by Ladd & Tilton Bank.

"2. That on or about the 3d day of October, 1912, Lewis-Wiley Hydraulic Company sold to Hattie Mitchell and McKinley Mitchell, the defendants above named, said lots two (2) and three (3) in block ten (10), Westover Terraces, for the total purchase price of \$6,750, paying \$750 in cash unto the Lewis-Wiley Hydraulic Company and, at the request of Lewis-Wiley Hydraulic Company, Hattie Mitchell and McKinley Mitchell executed a first mortgage on said lots in favor of the plaintiff, Ladd & Tilton Bank, for \$3,375 the said mortgage being the mortgage which is described in the complaint filed herein; and as a further portion of the consideration Hattie Mitchell and

McKinley Mitchell executed a mortgage for \$—— in favor of Lewis-Wiley Hydraulic Company to secure the payment of the balance of the consideration due Lewis-Wiley Hydraulic Company.

“3. For the purpose of permitting the Lewis-Wiley Hydraulic Company and Hattie Mitchell and McKinley Mitchell to consummate the purchase of the real property, as in paragraph 2 of this stipulation set forth, Lewis-Wiley Hydraulic Company requested Ladd & Tilton Bank to apportion to lots two (2) and three (3) in block ten (10), Westover Terraces aforesaid, such amount of the general indebtedness due unto Ladd & Tilton Bank from the Lewis-Wiley Hydraulic Company as should be proper and suitable in the premises and, pursuant to said request, Ladd & Tilton Bank did apportion to said lots two (2) and three (3) in block ten (10), Westover Terraces aforesaid, from the general indebtedness due from Lewis-Wiley Hydraulic Company to Ladd & Tilton Bank, the sum of \$3,375. The Lewis-Wiley Hydraulic Company, as a consideration for the segregation of said indebtedness by Ladd & Tilton Bank as aforesaid, did represent to Ladd & Tilton Bank that Hattie Mitchell and McKinley Mitchell would assume and pay such proportion of said segregated indebtedness and as evidence of said obligation of Hattie Mitchell and McKinley Mitchell to pay such proportion of such segregated indebtedness due unto Ladd & Tilton Bank from the Lewis-Wiley Hydraulic Company did execute the mortgage in the sum of \$3,375, the same being the mortgage more particularly described and set forth in the complaint filed in this cause.

“4. Hattie Mitchell and McKinley Mitchell were informed by the Lewis-Wiley Hydraulic Company of the fact that Ladd & Tilton Bank had a general blanket mortgage on the property known and described as Westover Terraces, and particularly lots two (2) and three (3) in block ten (10) thereof, which mortgage was to secure the repayment of moneys theretofore loaned by Ladd & Tilton Bank to Lewis-Wiley Hydraulic Company.

"5. That the mortgage in favor of Ladd & Tilton Bank was executed by Hattie Mitchell and McKinley Mitchell in consideration of the release by Ladd & Tilton Bank of lots two (2) and three (3) in block ten (10), Westover Terraces, aforesaid, from the security of the Lewis-Wiley Hydraulic Company as hereinbefore set forth and from the blanket mortgage executed to Ladd & Tilton Bank as hereinbefore set forth, and the repayment of the security afforded Ladd & Tilton Bank by said blanket mortgage.

"6. At the time that Hattie Mitchell and McKinley Mitchell executed the note for \$3,375 and gave a first mortgage on lots two (2) and three (3) in block ten (10), Westover Terraces aforesaid, as security for the same, the Lewis-Wiley Hydraulic Company was not released from the liability for the repayment of the moneys theretofore loaned by it unto the Lewis-Wiley Hydraulic Company, but at the time of the execution of said note and mortgage by Hattie Mitchell and McKinley Mitchell and contemporaneously therewith, and at the time of the lodging of the same with Ladd & Tilton Bank, the Lewis-Wiley Hydraulic Company did execute the following guarantee on the back of the note, in words and figures as follows, to wit:

" 'For value received Lewis-Wiley Hydraulic Company hereby guarantees the payment of the within note and waives protest, demand and notice of non-payment thereof.

" 'LEWIS-WILEY HYDRAULIC COMPANY,

" 'By W. C. MORSE,

" 'Vice-President.'

" 'Upon the foreclosure of a mortgage executed, 'to secure payment of the balance of the purchase price of real property' * * 'the mortgagee shall not be entitled to a deficiency judgment.' "

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Manning & Slater*, with an oral argument by *Mr. Woodson T. Slater*.

For respondent there was a brief over the name of *Messrs. Wood, Montague, Hunt & Cookingham*, with an oral argument by *Mr. P. W. Cookingham*.

BEAN, J.—The only issue in this case is whether the plaintiff is entitled to a judgment for any balance that may remain due after the application of the proceeds of the sale of the real property described in the mortgage. It is contended on behalf of defendants Hattie Mitchell and McKinley Mitchell, whom we will hereafter designate as defendants, as Lewis-Wiley Hydraulic Company, the other defendant, did not answer or appeal; that under the provisions of Section 426, L. O. L., the plaintiff is not entitled to a judgment for such balance or as it is termed, “a deficiency judgment.” The provisions of this section of our Code are as follows:

“When judgment or decree is given for the foreclosure of any mortgage, hereafter executed, to secure payment of the balance of the purchase price of real property, such judgment or decree shall provide for the sale of the real property, covered by such mortgage, for the satisfaction of the judgment or decree given therein, and the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same.”

The transaction delineated by the stipulation was of the same force and effect as though Ladd & Tilton Bank had loaned to the Mitchells \$3,375, Lewis-Wiley Hydraulic Company guaranteeing payment thereof, and then the Mitchells had paid the same to the Lewis-Wiley Hydraulic Company, and that company in turn had paid the same to Ladd & Tilton Bank. Instead of taking such a circuitous route, a three-cornered transaction was made. It might be stated that in effect the

Mitchells assumed and agreed to pay to Ladd & Tilton Bank a portion of the money the Lewis-Wiley Hydraulic Company had borrowed from Ladd & Tilton Bank. The Mitchells were not purchasers of the lots from Ladd & Tilton Bank; Ladd and Tilton Bank were not the sellers of the lots. The mortgage was not executed by the Mitchells "to secure the payment of the balance of the purchase price of real property" within the meaning of the statute. The original debt of the Lewis-Wiley Hydraulic Company to Ladd & Tilton Bank was for money loaned by the bank to that company. The mortgage given by the Mitchells to Ladd & Tilton Bank was in effect given for a loan.

1. The position of the defendants is that the mortgage was a purchase-money mortgage. We think that it may be conceded that it is a general rule, to which there is little dissent, that a mortgage on land executed by the purchaser of the land contemporaneously with the acquirement of the legal title thereto, or afterwards, but as a part of the same transaction, is a purchase-money mortgage, and entitled to preference as such over all other claims or liens arising through the mortgagor though they are prior in point of time; and this is true without reference to whether the mortgage was executed to the vendor or to a third person: 19 R. C. L., § 196, p. 416; *Marin v. Knox*, 117 Minn. 428 (136 N. W. 15, 40 L. R. A. (N. S.) 272, and note).

But this rule is of little assistance in determining the question in the case at bar involving a construction of Section 426, L. O. L., which was adopted for a different purpose.

The decisions, holding that if a loan is secured by a mortgage given on property purchased with the money lent, then such mortgage is a purchase-price mortgage were for the benefit of the mortgagee and not to his

detriment. In other words, the courts have construed such mortgages as purchase-price mortgages in order to secure to the mortgagee the full amount of the money advanced. In several jurisdictions, however, it is held that such mortgages are not purchase-price mortgages: *Hewisler v. Nickum*, 38 Md. 270; *Eyster v. Hatheway*, 50 Ill. 521 (99 Am. Dec. 537). In *Hewisler v. Nickum*, 38 Md. 270, it was said:

"The terms 'purchase money,' do not include any money that may be borrowed to complete a purchase, but that which is stipulated to be paid by the purchaser to the vendor, as between them only it is purchase money; as between the purchaser and lender, it is borrowed money."

2. A purchase-money mortgage is defined in 32 Cyc., at page 1267, as follows:

"A mortgage given, concurrently with a conveyance of land, by the vendee to the vendor, on the same land, to secure the unpaid balance of the purchase price": Citing Black's Law Dictionary.

While this definition is not the universal one, it seems to us that in enacting Section 426, L. O. L., the legislature acted with the kind of purchase-money mortgage in view, as defined above; that is, that the purpose of the law was to encourage and protect the purchaser of real estate, which perchance is made for the purpose of obtaining a home; that it was not the intent of the lawmakers to render it more difficult for such a purchaser to obtain a loan and pay the cash for a home, and receive the benefit of any lower price of the realty that might be made on account of such cash payment. That if the law should be so construed that anyone obtaining a loan and giving a real estate mortgage to a third party not the vendor of the land to secure the payment thereof, when it was contemplated

that the money so borrowed should be used in payment for the real property purchased at the time, would be executing a mortgage "to secure payment of the balance of the purchase price of real property," within the purview of the statute, and that the lender could only look to the property upon a foreclosure proceeding, then the person wishing to purchase a home or other real property, would be hampered and his credit impaired, and it might well be said that: "The last state of that man is worse than the first." In such event, the beneficent purpose of the law would be thwarted. It must be considered that the bank was not speculating in real estate in the transaction; it was doing a banking business. It was not the purpose or the intent of the law to regulate banking business or the loaning of money. The ordinary transactions of a bank do not come within the provisions of the act.

Whatever may be the construction of the section referred to when applied to a mortgage executed by a vendee to a vendor to secure the payment of the balance of the purchase price of real property, we believe that it was not the intention of the legislature that mortgages like the one in question in the present case should come within the provisions of Section 426, L. O. L. The decree of the lower court is therefore affirmed.

AFFIRMED.

JOHNS, J., not sitting.

BURNETT, BENSON and HARRIS, JJ., concur in the result.

Motion to dismiss appeal allowed October 21, 1919.

WESTERN LOAN CO. v. SPHIER.

(184 Pac. 496.)

Appeal and Error—Filing of Transcript Within Statutory Time or Extension Thereof Jurisdictional.

1. The filing of a transcript in the Supreme Court within the time allowed by law, or within any extension of that time, is jurisdictional, and the Supreme Court has no power to excuse a default.

From Deschutes: T. E. J. DUFFY, Judge.

In Banc.

Motion to dismiss appeal allowed.

APPEAL DISMISSED.

Mr. E. O. Stadler and Mr. Frank S. Grant, for the motion.

Mr. W. P. Myers, contra.

McBRIDE, C. J.—This is a motion to dismiss an appeal. A decree was rendered on February 20, 1919. A notice of appeal was served and filed March 29, 1919, and a final undertaking on appeal was filed April 17, 1919, whereby the appeal became perfected on April 23, 1919.

On April 17th an order was made extending the time to file transcript here, for thirty days. On May 17th an order was made further extending the time to file a bill of exceptions to and including June 20, 1919, and directing that the clerk have until and including July 1, 1919, to prepare and file a transcript in the Supreme Court. On June 19, 1919, an order was made directing that the time for filing a bill of exceptions be extended until June 30th, and that the clerk have ten days additional time after June 30, 1919, in which to

prepare and file in this court the transcript on appeal. The transcript was not filed until July 17, 1919, and is clearly too late to be effective.

1. The filing of a transcript in the Supreme Court within the time allowed by law, or within any extension of that time, is jurisdictional and this court has no power to excuse a default in that respect: *Davidson v. Columbia Timber Co.*, 49 Or. 577 (91 Pac. 441); *State v. Douglas*, 56 Or. 20 (107 Pac. 957), and cases there cited.

It follows that the appeal must be dismissed and the decree of the Circuit Court affirmed.

DISMISSED. AFFIRMED.

Argued October 1, affirmed October 21, 1919.

HALLBERG v. HARRIET.

(184 Pac. 549.)

Reformation of Instruments—Mortgage Assigned to Holders in Due Course Cannot be Reformed.

1. Against persons to whom note and mortgage security were assigned, before maturity and without knowledge of defects, by payee on their agreement to furnish him a home thereafter, their obligation in which respect they have fulfilled, there can be no reformation of the assigned instruments; the assignees being holders in due course, who under Section 5890, L. O. L., hold the instruments free from any defenses which might have been available against the payee.

[As to assignment of mortgage and its effect, see note in 14 Am. Dec. 512.

As to right to reform description in deed or mortgage as against purchaser without notice, see note in Ann. Cas. 1918D, 147.]

From Marion: GEORGE G. BINGHAM, Judge.

Department 1.

This is a suit to reform a mortgage and an agreement indorsed upon the back of the promissory note

secured thereby, in order that the plaintiff may obtain credit thereon for a certain sewer assessment, amounting to \$934.20. The substance of the complaint, reduced to narrative form, is about as follows:

On April 4, 1911, the plaintiff and Jacob Bezemer entered into a written agreement whereby the latter agreed to sell and plaintiff agreed to purchase a tract of land in the suburbs of Salem, for the sum of \$12,000. By the terms of the writing, a payment of \$200 was then made, and upon a further payment of \$1,800, Bezemer was to convey the land to plaintiff who was to execute and deliver her note for \$10,000, secured by a mortgage upon the property payable in three years, with interest at 6 per cent per annum. After the execution of the contract of April 4, 1911, it was discovered that, by a mutual mistake of the parties an important detail of the agreements had been omitted therefrom and in order to more fully express in writing their contract, they caused to be executed a supplemental agreement as follows:

"It is understood between the parties in the foregoing agreement that the purchase price of \$12,000, is to include the sewer assessment now against the land and that if said sewer assessment, by virtue of a court decision, does not have to be paid, it shall be either refunded or endorsed on the note.

"(Signed) JACOB BEZEMER.

"Witness:

"NETTIE J. MILLER."

On April 18, 1911, they undertook to execute the terms of the contract, and in so doing, Bezemer executed a warranty deed to plaintiff for the property, and the latter having made the preliminary payments agreed upon, executed her promissory note for \$10,000, and a mortgage upon the property, in which she was joined by her husband, but the mortgage contains no

covenant like the supplemental agreement above set out. Under the terms of the mortgage, certain sales have been made of portions of the land, and such tracts have been released from the lien thereof. On April 18, 1914, plaintiff by her agent, R. C. Hallberg, agreed with the defendant Cornelia B. Harriet for an extension of time for the payment of the balance due on the note, to April 18, 1915, and defendant's attorney, in reducing such extension agreement to writing on the back of the note, made a mistake and inserted therein the sum of \$2,820, as the balance due, whereas, in fact, it was no more than \$1,545.14, after deducting \$934.20, on account of the sewer assessment, which had been held to be void, in a decision of the Supreme Court, filed June 4, 1912. Plaintiff signed said erroneous statement on the note by mistake and inadvertence. Neither party discussed or agreed to fix the amount then due on the note, and there was no consideration for waiving the terms of the original agreement respecting the sewer assessment. Bezemer assigned the note and mortgage to his three children, Cornelia B. Harriet, Anna Eberman and Klaus Bezemer, and Klaus Bezemer has sold his interest therein to Cornelia B. Harriet and Anna Eberman has since died and the defendants claim to be the owners of the note and mortgage, which they took with full knowledge and notice of the terms of the agreement between plaintiff and Bezemer, subject to all the equities and defenses thereto and plaintiff has demanded credit upon the note for the sewer assessment, which has been refused. Plaintiff is ready, able and willing to pay the balance due on the note, and prays for a decree reforming the mortgage so that it shall include the supplemental contract, and the agreement on the note so that it shall not undertake to state the bal-

ance then due, and that upon payment of the sum due after deducting the amount of the sewer assessment and the interest thereon, that defendants be required to satisfy and cancel the mortgage.

The answer denies the execution of the supplemental agreement, or any knowledge or notice thereof, and pleads several affirmative defenses, among which are, that on July 1, 1912, Jacob Bezemer for a good and valuable consideration sold the note and mortgage to Cornelia B. Harriet, Anna Eberman and Klaus Bezemer, who were innocent and *bona fide* purchasers thereof, in the regular course of business, without any knowledge, information or belief as to any of the alleged equities set forth as existing between plaintiff and Jacob Bezemer. It is also alleged, by way of estoppel, that on April 18, 1914 (being the occasion mentioned in the complaint, when the extension agreement was indorsed on the note), Klaus Bezemer refused to grant any further time for the payment of his share of the debt, and plaintiff then paid to said Bezemer the entire balance due for his one third of the note, with interest thereon, without making any claim for a deduction on account of the sewer assessment, and that such payment would now require these defendants to suffer more than their just share of such deduction. It is further averred that what occurred on April 18, 1914, at the time when the extension agreement was indorsed on the note and signed by plaintiff, by her agent, constituted an account stated. The reply joins issue upon the affirmative defenses. A trial was had, resulting in a decree dismissing the suit, from which plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Myron E. Pogue*.

For respondents there was a brief over the names of *Mr. James G. Heltzel* and *Mr. Max Gehlhar*, with an oral argument by *Mr. Heltzel*.

BENSON, J.—There is a very decided conflict in the evidence as to the execution of the supplemental agreement mentioned in the pleadings. Jacob Bezemer admits that the signature thereto is his, but disclaims any knowledge as to the circumstances under which he signed it, and insists very positively that there was never any understanding between them in regard to the sewer assessment, and is positive that it was never discussed between them. R. C. Hallberg is equally positive that it was fully discussed and assented to, and that it was cheerfully signed by Bezemer. Other witnesses testify that it was signed by Bezemer in John H. McNary's law office, and in their presence. The note and mortgage were executed on April 18, 1911, maturing April 18, 1914. Bezemer assigned the note and mortgage to his three children in July, 1912, upon their agreement to furnish him a home thereafter and they have fulfilled their obligation in that respect. The evidence is uncontradicted that they had no knowledge of the supplemental agreement until late in the fall of 1915, long after the maturity of the note. On April 18, 1914, the date of the maturity of the note, plaintiff sought an extension of time thereon for another year. Mrs. Harriet, who was acting as the attorney in fact for her brother, Klaus Bezemer, and her sister, Anna Eberman, informed plaintiff's husband, R. C. Hallberg, who has acted throughout as his wife's agent, that Klaus Bezemer would not consent to any extension of time, and must have his share of the debt, with interest, at once, but that she and her sister would extend the time of payment of their portions until

April 18, 1915, if plaintiff would agree to pay 8 per cent interest instead of 6 per cent. Thereupon, the attorney for Mrs. Harriet wrote upon the back of the note the following memorandum, which was signed by Mr. Hallberg:

“Salem, Ore., Apr. 18, -14.

“In consideration of the extension of the time of the payment of this note until Apr. 18, 1915, I agree to pay 8% int. on the deferred payment of \$2820.00.

“MARIE HALLBERG.

“By R. C. HALLBERG.”

At the same time Hallberg paid one third of the amount then due, with the accrued interest thereon, with the understanding that it was to fully satisfy Klaus Bezemer for his share of the note. No reference was then made to the sewer assessment by Hallberg, and Mrs. Harriet was totally ignorant of any agreement in relation thereto. Why Hallberg never mentioned it during the years that he was making payments upon both principal and interest; why, when he paid the share belonging to Klaus Bezemer, on April 18, 1914, he paid the same in full, with interest, and claimed no deduction on account of the sewer assessment, it is difficult to comprehend, and is not satisfactorily explained. However, it is not necessary for us to weigh the conflicting evidence in these particulars, since, in any event, the defendants are holders in due course of the note and mortgage, and hold them free from any defenses which might have been available against the payee: Section 5890, L. O. L.

The decree of the lower court is affirmed.

AFFIRMED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ.,
concur.

Argued October 3, affirmed October 21, 1919.

PENINSULA LUM. CO. v. ROYAL INDEMNITY CO.

(184 Pac. 562.)

Reformation of Instruments—Burden of Proof on Plaintiff to Prove Mistake.

1. In action to correct alleged mutual mistake in indemnity policy, plaintiff has burden of proving the mistake by a preponderance of evidence.

Reformation of Instruments—Complaint Must Allege Original Agreement and Point Out Mutual Mistake.

2. In suits to reform a written instrument on the ground of mistake, the complaint must clearly state what the original agreement of the parties was, and point out with precision wherein there was a misunderstanding, that the mistake was mutual and did not arise from the gross negligence of the plaintiff, or that the misconception originated in the fraud of the defendant.

Insurance—Application for Liability Policy Presumably for Ordinary Policy.

3. Where application was made for employer's liability policy without going into any details as to the conditions to be placed in the policy, it will be presumed that the ordinary form of policy was to be used.

Reformation of Instruments—Evidence Insufficient to Show Mutual Mistake.

4. In action to correct employer's liability policy upon ground that words "No exceptions" had by mistake been placed after printed statement that no such insurance had "been canceled or the renewal thereof refused, except as follows," evidence *held* to preponderate against the claim that the mistake was mutual.

Insurance—Statement as to Other Insurance Construed as Absolute.

5. Insured's statement that no insurance of specified kinds "has been declined, nor has any such insurance been canceled or the renewal thereof refused, except as follows," if followed by no exception, must be taken to be absolute, since it is incumbent upon insured to qualify statement if there is an exception, the exception being presumably within his knowledge, and the legal effect of such unqualified statement, where exception is within knowledge of insured, but unknown to insurer, being same as if words "no exception" followed.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

This is a suit by the insured to correct an alleged mistake in an indemnity policy issued by the defend-

ant. The plaintiff was engaged in the manufacture of lumber and took the insurance to save it harmless against damages it might be compelled to pay to employees injured in its service. The policy was issued in consideration of a money premium deposited and, as worded in the instrument, "of the statements contained in the schedule indorsed hereon, which statements the insured by the acceptance of this policy warrants to be true and which are hereby made part hereof." The twelfth of these statements recites several kinds of insurance, among others, "workmen's compensation and employers' liability," and declares that none of such insurance is carried. As appears on the policy, statement No. 13 is printed in this language:

"No insurance of the kinds specified in Statement 12 proposed by or on behalf of the Insured has been declined, nor has any such insurance been canceled or the renewal thereof refused, except as follows."

Following this in typewriting are the words, "No exceptions."

The plaintiff avers:

"That the insertion of said words 'No exceptions,' in Number 13 of the Schedule of Statements, was made by the scrivener or copyist who was employed by defendant's said agent, Gerlinger-Richards Co., and who wrote said policy, by mistake, and was not inserted at the instigation of either the plaintiff or defendant. That said statement was never made by plaintiff, or by anyone on its behalf, or by its authority, or with its knowledge, or consent, and constituted no part of said contract of insurance between the parties. That the error in the insertion of said words 'No exceptions' in said Schedule 13, as aforesaid, was not noticed by plaintiff when said policy was delivered to it, nor until the defendant attempted to repudiate liability thereon, as hereinafter stated."

Other allegations of the complaint are designed to support a recovery on the policy as reformed and are not important to the consideration of the case on the issue of mistake. The prayer is that the words "no exceptions" be stricken out, and otherwise for a recovery on the policy. The quoted allegation of the complaint, with others, is denied, but the issuance of the policy in the form stated is admitted. It also appears by the pleadings that a previous insurance in favor of the plaintiff on the same risk coming within the description in statement No. 12 had been canceled just prior to the issuance of the policy in suit and that no disclosure respecting the same was made to the defendant by or on behalf of the plaintiff.

In substance, the answer is that the plaintiff applied to the defendant for the policy of insurance and it was agreed by them that the defendant would issue and the plaintiff would accept the defendant's ordinary form of such insurance and that in pursuance thereof the policy was issued in the form stated in the complaint. This in turn was denied by the reply.

The court made findings of fact and conclusions of law in favor of the defendant and dismissed the suit, from which decree the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. R. Sleight* and *Mr. James B. Kerr*, with an oral argument by *Mr. Sleight*.

For respondent there was a brief over the names of *Mr. H. B. M. Miller*, *Messrs. Wilbur, Spencer & Beckett* and *Mr. James A. Watt*, with oral arguments by *Mr. R. W. Wilbur* and *Mr. Miller*.

BURNETT, J.—1. In effect, the plaintiff alleges a mutual mistake in the writing and the defendant denies this. As this is the issue, it is incumbent upon the plaintiff to prove the affirmative of the same by a preponderance of the evidence. Without dispute, it clearly appears that a former policy of the same nature, issued to the plaintiff by another company on the same risk, had been canceled, all within the knowledge of the plaintiff, and that nothing was said by its representatives to those of the defendant about this during the negotiations for the policy in suit. The instrument was written by a stenographer in the office of the agents of the defendant, under the direction of and from memoranda written by the man having charge of that particular kind of insurance. He testifies to the effect that he took the ordinary printed blank policy customarily used by the defendant in such business and designedly and purposely caused to be put into the blank after the thirteenth statement the words “no exceptions”; that he wrote them in the memoranda furnished to the stenographer and that the latter followed them according to his directions. The substance of the testimony of the witnesses for the plaintiff is that nothing was said about previously canceled insurance. The then secretary of the plaintiff, who appears to have conducted the negotiations in the main on behalf of the company, testifies thus:

“Q. As a matter of fact, this policy involved in this action was issued to you because you wanted it, was it not?

“A. Oh, yes, we wanted the policy.

“Q. And you made application to the proper person to get it, did you not?

“A. We gave them a chance to figure on the business; yes, sir.

"Q. And at the time of the issuance of the policy I suppose you told them what you wanted was employers' liability insurance?

"A. I think I did; yes.

"Q. And the nature of the property that you had?

"A. I don't think I went into details. They were familiar with it themselves.

"Q. You didn't go into any of the details at all as to any of the conditions that should be placed in the policy?

"A. I did not.

"Q. You knew that the company to whom this application was made was a company that was issuing policies of that kind?

"A. Yes, sir.

"Q. And you simply made application that a policy—an employer's liability policy—be issued to you covering your plant, without going into any details at all as to any of the conditions or statements provided in the policy?

"A. I did."

In connection with this testimony, it is thus laid down as a rule in *Cleveland Oil Co. v. Norwich Insurance Society*, 34 Or. 228 (55 Pac. 435), in an opinion by Mr. Justice MOORE:

"So, too, the law will presume that the minds of the parties met upon an agreement containing the terms and conditions of a policy such as is usually issued by the contracting insurance company covering like risks: 1 May on Insurance (3 ed.), § 23; *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609 (41 N. W. 373); *Smith v. State Ins. Co.*, 64 Iowa, 716 (21 N. W. 145); *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325 (11 Am. Rep. 125); *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594 (19 Am. Rep. 305); *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256 (94 Am. Dec. 65); *Fuller v. Insurance Co.*, 36 Wis. 599; *Salisbury v. Hekla Ins. Co.*, 32 Minn. 458 (21 N. W. 552)."

2. In this state the precept is thoroughly established and of long standing that in suits to reform a written instrument on the ground of mistake the complaint must clearly state what the original agreement of the parties was, and point out with precision wherein there was a misunderstanding; that the mistake was mutual and did not arise from the gross negligence of the plaintiff, or that the misconception originated in the fraud of the defendant: *Boardman v. Insurance Company of Pennsylvania*, 84 Or. 60 (164 Pac. 558); *Evarts v. Steger*, 5 Or. 147; *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *McCoy v. Bayley*, 8 Or. 196; *Foster v. Schmeer*, 15 Or. 363 (15 Pac. 626); *Hyland v. Hyland*, 19 Or. 51 (23 Pac. 811); *Meier v. Kelly*, 20 Or. 86 (25 Pac. 73); *Epstein v. State Ins. Co.*, 21 Or. 179 (27 Pac. 1045); *Kleinsorge v. Rohse*, 25 Or. 51 (34 Pac. 874); *Osborn v. Ketchum*, 25 Or. 352 (35 Pac. 972); *Thornton v. Krimbel*, 28 Or. 271 (42 Pac. 995); *Mitchell v. Holman*, 30 Or. 280 (47 Pac. 616); *Sellwood v. Henneman*, 36 Or. 575 (60 Pac. 12); *Stein v. Phillips*, 47 Or. 545 (84 Pac. 793); *Bower v. Bowser*, 49 Or. 182 (88 Pac. 1104); *Smith v. Interior Warehouse Co.*, 51 Or. 578 (94 Pac. 508, 95 Pac. 499); *Howard v. Tettelbaum*, 61 Or. 144 (120 Pac. 373); *Suksdorf v. Spokane, P. & S. Ry. Co.*, 72 Or. 398 (143 Pac. 1104); *Hyde v. Kirkpatrick*, 78 Or. 466 (153 Pac. 41, 488).

3, 4. In a sense, stating an account of the evidence, we have for the plaintiff the statement that nothing was said about the existence or cancellation of previous insurance of the kind in contemplation. On behalf of the defendant there is the testimony of its agent that he designedly inserted the words "no exceptions," which the plaintiff would elide, and that the policy was

the one in ordinary use by the defendant company for such risks. Added to this on behalf of the defendant is the testimony of the plaintiff's secretary, already quoted, giving rise to the presumption as a piece of evidence in favor of the defendant, that the ordinary form of policy was to be used. In our judgment, the positive testimony on behalf of the defendant, coupled with the presumption already quoted, constitutes a preponderance of the testimony against the mutuality of the mistake so necessary to be shown if any correction should be made in the document.

5. We note also that the only change the plaintiff seeks is to strike out the typewritten words, "no exceptions." By the terms of the policy these numbered statements are imputed to the applicant for insurance, for at the outset in the instrument it is said to have been issued in consideration of the money premium and of the statements contained in the schedule which the insured warrants to be true. The statement as printed was that:

"No insurance of the kinds specified in Statement 12 proposed by or on behalf of the Insured has been declined, nor has any such insurance been canceled or the renewal thereof refused, except as follows."

If no exception followed, this statement must be taken to be absolute and, being a warranty, must be strictly true as stated: *Buford v. New York Life Ins. Co.*, 5 Or. 334. If the party making this absolute statement would qualify it by an exception, it is incumbent upon him to state the exception, because it is presumably within his knowledge. In this instance the testimony shows that the exception was within the knowledge of the assured but was unknown to the insurer. Consequently, it is immaterial whether or not

the words "no exceptions" be stricken from the policy, because the legal effect of the clause is the same whether the two words in question be retained or discarded.

But aside from this possibly technical ground, the weight of the testimony is in favor of the proposition that the alleged mistake was not mutual, and that the most which can be said of the situation is that the plaintiff did not notice that provision in the policy while the defendant designedly inserted the words complained of and purposely used the form of policy employed. To reform the policy so as to make its legal effect different from what it appears on its face under the circumstances would be to make a new contract for the parties contrary to the understanding of at least one of them. The testimony on behalf of the plaintiff falls short of pointing out with clearness what the original agreement of the parties was. It only states in substance that the words "no exceptions" were not to be put into the contract and that nothing was said about previous insurance. What, if anything, in the main, was to be affirmatively stated as the binding agreement between the parties is left to conjecture. But, above all, the preponderance reveals that the mistake, if any, was not mutual. The result is that the decree of the Circuit Court must be affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.



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1. Under treaties between the United States and Austria-Hungary, which contained the usual most favored nation clause, and treaties between the United States and other countries, *held* that consul general of Austria-Hungary might authorize attorneys to institute action on behalf of an Austro-Hungarian national where conditions were such, because of the war between Austria-Hungary and other countries, that it was practically impossible for the national to directly authorize the institution of the action. (*Ljubich v. Western Coöperage Co.*, 633.)

APPEAL AND ERROR.

Appeal and Error—Period in Which to File Transcript.

1. Where undertaking was filed January 14th, and was not excepted to, the period in which to file transcript did not expire until 30 days from January 19th, the appeal not having been perfected, under Section 550, subdivision 4, L. O. L., until the expiration of the five-day period after filing of undertaking. (*Martin v. Moreland*, 61.)

Appeal and Error—Review—Evidence—Exclusion of Land from Irrigation District.

2. Court's refusal to exclude land within proposed irrigation district from proposed district cannot be reviewed on appeal, in absence of the evidence upon such question. (*Hanley Co. v. Harney Valley Irr. Dist.*, 78.)

Appeal and Error—Review—Determination.

3. Where plaintiff did not appeal in an equity case, the appellate court cannot increase the award in his favor even though it hears the case *de novo*. (*Sweeney v. Jackson County*, 96.)

Appeal and Error—Review—Determination.

4. Under Section 556, L. O. L., the appellate court hears an equity case *de novo*, and it may affirm the decree though it bases the affirmation on reasoning differing from that of the trial court. (*Sweeney v. Jackson County*, 96.)

Appeal and Error—Review—Verdict.

5. Under Article VII, Section 3, of the Constitution, *as amended*, which declares that no fact tried by a jury shall be re-examined by any court unless the court can affirmatively say there is no evidence

to support the verdict, the Supreme Court cannot consider the weight of the evidence, when there is any substantial testimony to support the verdict. (*Fuller v. Oregon-Wash. R. & N. Co.*, 160.)

Appeal and Error—Review—Harmless Error.

6. In an action for the death of a rear-end brakeman, killed in a collision, where the pleadings admitted and the evidence showed that he was in the caboose at the time of the collision, questions as to his whereabouts a moment or two before *held* in no wise prejudicial. (*Fuller v. Oregon-Wash. R. & N. Co.*, 160.)

Appeal and Error—Review—Evidence—Conclusiveness.

7. Evidence in support of the verdict will be deemed conclusive on appeal. (*Fuller v. Oregon-Wash. R. & N. Co.*, 160.)

Appeal and Error—Disposal of Cause—Statutory Amendments.

8. Where an action was brought in 1914 to restrain a county treasurer from collecting penalties under Section 3682, L. O. L., as amended by Laws of 1913, page 334, Section 20, and a demurrer to the complaint was sustained, and an appeal was taken to the Supreme Court, and pending the appeal the act of 1913 was amended by Laws of 1915, page 184, Section 1, so as to eliminate the penalties, and Laws of 1915, page 298, an act of general amnesty and forgiveness as to penalties incurred, was enacted, the demurrer will be sustained by the Supreme Court, but the clerk of the Circuit Court, where the taxes without the penalties were tendered, will be ordered to pay to the county treasurer the amount so tendered and paid into court, and the proper authorities will be ordered to accept the same in full payment of taxes. (*Spexarth v. Sherman*, 254.)

Appeal and Error—Order Extending Time for Filing Transcript—Date of Taking Effect.

9. An order extending time for filing transcript pursuant to Section 554, subdivision 2, L. O. L., is made when it is in writing and signed by the judge, in view of Section 534, but is not effective until delivered to the clerk. (*Robinson v. Phegley*, 299.)

Appeal and Error—Order Extending Time for Filing Transcript—"Filing."

10. Order extending time for filing transcript *held* sufficiently filed; "filing" not being merely the indorsement which the clerk makes, but the fact that the instrument is placed in his custody with intent to make it effective. (*Robinson v. Phegley*, 299.)

Appeal and Error—Notice of Appeal.

11. Under Deady & Lane Gen. Laws, Chapter 6, Section 527, as amended by General Laws of 1899, page 227, notice of appeal may be signed by the party appealing or his attorney. (*Robinson v. Phegley*, 299.)

Appeal and Error—Notice of Appeal—Description of Decree—Sufficiency.

12. Notice of appeal *held* to sufficiently describe decree appealed from. (*Robinson v. Phegley*, 299.)

Appeal and Error—Specification of Errors—Dismissal.

13. Though appellant's abstract did not contain an assignment of errors, as required by Rules 11 and 12, 89 Or. 715-717 (165 Pac. viii), held that as the failure to furnish specification of errors is not jurisdictional, and as it appeared from an affidavit of appellant's attorney, showing that the time to file an abstract was short when he came into the case, and that through haste he omitted to file an assignment of errors, the appeal should not be dismissed, and appellant should be permitted to amend the abstract. (Robinson v. Phegley, 299.)

Appeal and Error—Equity Suit—Trial De Novo.

14. The suit being in equity, it is tried *de novo* in the Supreme Court. (Robinson v. Phegley, 299.)

Appeal and Error—Without Objection to Confirmation of Sale Jurisdictional Questions Only Reviewable.

15. Where no application to set aside the order of confirmation of sale of real property was made, and there was no attempt to call the lower court's attention to want of service on defendants of motion to confirm as violating the court rules, and there being no action in the lower court raising and reserving this or other questions, the review is limited to jurisdictional questions and sufficiency of pleadings. (Roseburg Nat. Bank v. Camp, 339.)

Appeal and Error—Review—Disposition as to Defendants Who Do not Appeal.

16. Where some of the defendants against whom judgment is rendered appeal and others do not appeal, the appellate court, in holding lower court in error, will reverse judgment only as against the defendants who appealed. (Le Vee v. Le Vee, 370.)

Appeal and Error—Reversal as to Some Defendants Did not Affect Those not Appealing.

17. Where a mother for consideration agreed to convey to a son her share of land owned by them in common, and after her death he sued his sisters and brother, to whom the mother had devised the land subject to a life estate in his favor, and some of the children made no resistance, defaulting or withdrawing appearance, and decree was rendered for the son against all the other children, part of whom appealed, the reversal of the decree as to the children who appealed did not necessarily work a reversal as to those who did not contest the complaint. (Le Vee v. Le Vee, 370.)

Appeal and Error—Review—Harmless Error.

18. In buyer's action for seller's failure to deliver spruce lumber, admission of evidence as to market value of higher grade of spruce than that called for by the contract was harmless to seller, where only effect of such evidence was to explain prevailing high price of all grades of spruce. (Duncan Lum. Co. v. Willapa Lum. Co., 386.)

Appeal and Error—Discretion of Court—Rebuttal Testimony.

19. Discretion of court in admitting evidence designed to prove original cause of action, by plaintiff on rebuttal, is not reviewable in absence of manifest abuse. (Duncan Lum. Co. v. Willapa Lum. Co., 386.)

Appeal and Error—Undertaking.

20. An undertaking on appeal to satisfy the decree, if affirmed, and to deliver certain personal property, *held* to comply with Section 551, subdivisions 1 and 3, L. O. L., and not to limit the security to a specific amount. (Helms Groover & Dubber Co. v. Copenhagen, 410.)

Appeal and Error—Corrections in Record—Where Made.

21. If there is any error in the orders of the trial court as entered in the record, application for a correction thereof should be made in the trial court and not the appellate court. (Helms Groover & Dubber Co. v. Copenhagen, 410.)

Appeal and Error—Jurisdiction of Trial Court—Corrections of Errors.

22. As a general rule, the pendency of an appeal does not divest the trial court of the power to correct its record so as to conform to the truth and truly set forth the proceedings as they actually occurred. (Helms Groover & Dubber Co. v. Copenhagen, 410.)

Appeal and Error—Stay of Proceedings—Revocation of Order.

23. A notation on an undertaking on appeal, "Bond is hereby approved without affecting decree or changing same in any way," did not revoke an order staying proceedings, made after delivery of the decree. (Helms Groover & Dubber Co. v. Copenhagen, 410.)

Appeal and Error—Effect of Appeal on Writ of Error.

24. According to the common law, a writ of error operated *per se* as a supersedeas and prevented the issuance of execution to enforce the judgment, and the same effect was also given to an appeal in chancery. (Helms Groover & Dubber Co. v. Copenhagen, 410.)

Appeal and Error—Stay of Proceedings—Effect of Appeal.

25. An appeal from a decree granting a prohibitory injunction which is self-executing and requires no affirmative action, merely maintaining the *status quo* pending the appeal, does not suspend the injunction, but a mandatory injunction compelling affirmative action cannot be enforced pending a duly perfected appeal. (Helms Groover & Dubber Co. v. Copenhagen, 410.)

Appeal and Error—Stay of Proceedings—Power of Courts.

26. It is the general rule that either the lower or appellate courts, according to the circumstances, have inherent power to grant a stay of proceedings pending an appeal, even where there is no statute entitling a party to such stay; but, where there is a statute, its conditions must be complied with. (Helms Groover & Dubber Co. v. Copenhagen, 410.)

Appeal and Error—Undertaking on Appeal—Care of Personal Property.

27. In a suit involving patented machines, it was appropriate for the trial court to impose the condition that the defendants give an undertaking on appeal and continue to operate the machines; it being better for all concerned that the operation thereof should not cease during the litigation. (Helms Groover & Dubber Co. v. Copenhagen, 410.)

Appeal and Error—Jurisdiction—Supreme Court—Injunction.

28. Notwithstanding Article VII, Section 2, of the Constitution, and Section 6 prior to amendment in 1910, the Supreme Court in order to preserve the subject matter of an appeal pending a hearing on the merits, may issue a restraining order to aid or protect its appellate jurisdiction. (Helms Groover & Dubber Co. v. Copenhagen, 410.)

Appeal and Error—Care of Property Pending Appeal.

29. Where the trial court has made temporary provision for the care and management of personal property pending appeal, the Supreme Court will not ignore or lightly disturb the order. (Helms Groover & Dubber Co. v. Copenhagen, 410.)

Appeal and Error—Supersedeas—Contempt.

30. When an appeal is taken from an order granting a prohibitory injunction, the trial court still retains jurisdiction pending the appeal to punish, as a contempt, the violation of the injunction; the contempt proceedings being wholly independent of the appeal. (Helms Groover & Dubber Co. v. Copenhagen, 410.)

Appeal and Error—Sufficiency of Undertaking—Signature of Principal.

31. An appeal undertaking, reciting that plaintiff has appealed, and covenanting with defendant that in consideration thereof plaintiff will pay all damages, etc., awarded against him is sufficient, though not signed by plaintiff. (Mays v. Robert Mays Estate Co., 502.)

Appeal and Error—Undertaking—Recitals—Sufficiency.

32. An appeal undertaking, reciting that plaintiff has appealed and covenanting with defendant that in consideration thereof plaintiff will pay all damages, etc., awarded against him, is sufficient, though person signing does not describe herself as surety. (Mays v. Robert Mays Estate Co., 502.)

Appeal and Error—Finding of Lower Court will not be Disturbed.

33. In a suit to reform a deed, finding of trial judge, who heard and saw the witnesses, that there was a mistake should not be disturbed, the contrary evidence consisting only of a few suspicious circumstances. (Welch v. Johnson, 591.)

Appeal and Error—Reformation of Instruments—When Defect in Necessary Parties Defendant is Immaterial.

34. In a suit to reform a deed by striking out the clause obligating purchaser to pay a note and mortgage, purchaser's grantors, as well as their mortgagee, should be made parties, but, on mortgagee's appeal from a judgment for purchaser, the cause need not be remanded for failure to make grantors parties, where they, as witnesses for plaintiff, testified that he did not agree to assume the note and mortgage, which estops their denial thereof. (Welch v. Johnson, 591.)

Appeal and Error—Undertaking—Void Service.

35. Where appellant's attorney attempted to serve the undertaking upon respondent's attorney by leaving a copy at his supposed residence which in fact was not his residence, the service was void. (McKissick v. McKissick, 644.)

Appeal and Error—Undertaking—Void Service—Mistake.

36. Where appellant's attorney in good faith attempted to serve the undertaking upon respondent's attorney by leaving a copy at his supposed residence, but failed to make good service because latter did not in fact live in such residence, the court, under Section 550, subdivision 4, L. O. L., may permit service to be made on such terms as may be just. (*McKissick v. McKissick*, 644.)

Appeal and Error—Sufficiency of Notice of Appeal.

37. Under Section 550, subdivision 1, L. O. L., notice of appeal specifying the court in which the judgment was rendered, giving the names of the parties, and notifying defendant and his attorney that plaintiff appealed to the Supreme Court from the judgment for defendant and against plaintiff, entered in a named court on a given date, the undertaking on appeal served on defendant reciting that the appeal was to the Supreme Court, *held* sufficient. (*Farmers & Fruit-Growers' Bank v. Davis*, 655.)

Appeal and Error—Extension of Time for Filing Transcript not Beyond Next Term.

38. Under Section 554, subdivision 2, L. O. L., where the next term of the Supreme Court after an appeal perfected January 16th commenced March 4th and ended October 7th, when the next term began, the time for filing transcript was not extended beyond the next term by orders the last of which prescribed the time as until August 5, 1918. (*Farmers & Fruit-Growers' Bank v. Davis*, 655.)

Appeal and Error—Filing of Transcript Within Statutory Time or Extension Thereof Jurisdictional.

39. The filing of a transcript in the Supreme Court within the time allowed by law, or within any extension of that time, is jurisdictional, and the Supreme Court has no power to excuse a default. (*Western Loan Co. v. Sphier*, 677.)

APPEARANCE.**Appearance—General Appearance After Special.**

1. Trial of cause on merits after special appearance attacking jurisdiction of court is in effect a general appearance. (*Sweeney v. Jackson County*, 96.)

Appearance—Defects in Process—Waiver—Answer upon Merits.

2. The filing of an answer upon the merits constitutes a voluntary appearance and a waiver of any defect in the service of summons, though plea in abatement challenging jurisdiction of the person is joined with plea to the merits, notwithstanding Section 74, L. O. L., as amended by Laws of 1911, page 144. (*Duncan Lum. Co. v. Wallapa Lum. Co.*, 386.)

Appearance—General Appearance After Special Appearance.

3. Though defendant's appearance be a special one, limited to a particular purpose, yet if he appears and offers contest on the merits of the complaint, it is a general appearance, giving jurisdiction of the person as to all matters in controversy. (*Duncan Lum. Co. v. Wallapa Lum. Co.*, 386.)

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1. Where purchaser informed bank, from whom he had borrowed the money with which to make first payment that he had given up the deal and turned the property back to vendor, bank, attaching property two weeks after vendor had retaken possession, was not in the position of an innocent purchaser without notice, having information sufficient to place it upon inquiry. (*Saling v. First Nat. Bank of Tillamook*, 237.)

Attachment—Adverse Claims—Notice.

2. An attaching claimant takes subject to any adverse claims of which he has knowledge or sufficient notice to put him upon inquiry, notwithstanding Section 301, L. O. L. (*Saling v. First Nat. Bank of Tillamook*, 237.)

Attachment—Adverse Claim—Collusion—Pleading.

3. In action by father to determine adverse claim to father's real estate by son's creditor under an attachment levied upon the property which father had conveyed to son and son had reconveyed to father, allegations of affirmative defense held sufficient to charge collusion between father and son. (*Saling v. First Nat. Bank of Tillamook*, 237.)

Attachment—Collusion—Father and Son.

4. Where father fraudulently, and acting in collusion with son, conveyed property to son, to enable son to obtain credit, and son secretly reconveyed property to father, but with father's knowledge, held himself out as owner, and father, knowing that son was unable to pay debts secretly, and with intent to defraud son's creditors, filed deed purporting to have been executed by son, father will not be given relief against son's creditors, who attached property subsequent to reconveyance, in equitable action to determine such adverse claim. (*Saling v. First Nat. Bank of Tillamook*, 237)

ATTORNEY AND CLIENT.

Attorney and Client—Disbarment Proceedings—Petition—Sufficiency.

1. The mere fact that a petition for disbarment of an attorney was entitled "In the Supreme Court of the State of Oregon in and for Multnomah County" did not invalidate it, but the addition of the words naming the county was a clerical error, and could not mislead defendant. (*State ex rel. v. Greenfield*, 407.)

Attorney and Client—Disbarment Proceedings—Petition—Sufficiency.

2. Since a proceeding for disbarment is neither civil nor criminal, and is governed by its own rules and not by those governing complaints in civil actions or criminal proceedings unless the statute has made them applicable and there is no requirement that the complaint be verified, the court will merely require such verification as assures good faith. (State ex rel. v. Greenfield, 407.)

Attorney and Client—Disbarment Proceedings—Petition—Sufficiency.

3. In a proceeding for disbarment of an attorney, a verification made on affidavits of an attorney, who deposed that he was attorney for petitioners and was one of the petitioners himself and a member of the bar association, is technically sufficient. (State ex rel. v. Greenfield, 407.)

Attorney and Client—Disbarment Proceedings—Technical Accuracy.

4. In disbarment proceedings, the court will look to the substance of the charge rather than the technical accuracy with which it is presented. (State ex rel. v. Greenfield, 407.)

Attorney and Client—Implied Authority of Attorney to Admit Away Client's Case.

5. A general attorney had no implied authority, merely from his employment, to bind his client by an admission there was no mistake in the terms and conditions of the conveyance to the client, in the absence of pending litigation in which he was appearing as attorney of record. (Welch v. Johnson, 591.)

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BROKERS.

Brokers—Sale on Del Credere Commission—Status as Debtor.

1. The weight of authority is that a broker selling goods on a *del credere* commission stands in the relation of an original debtor to his principal. (Fletcher v. Fischer, 265.)

See Factors, 1.

BULK SALES LAW.

See Fraudulent Conveyances, 1-4.

BURDEN OF PROOF.

See Deeds, 3.

See Divorce, 1-6.

See Mortgages, 3.

See Reformation of Instruments, 6.

CHARTER OF CITIES.

Cited and Construed in this Volume.

PORTLAND.

See Killingsworth v. Portland, 525.

SEASIDE.

See Cole v. Seaside, 65.

CITIES.

See Municipal Corporations.

CITY CHARTERS.

See Charters of Cities.

COLLUSION.

Pleading Sufficient to Charge Collusion.

See Attachment, 3, 4.

COMMON LAW.

Common Law—English Statutes—Applicability.

1. English statutes passed before the emigration of our ancestors, in aid or amendment of the common law, applicable to our condition and not repugnant to our institutions, constitute a part of our common law. (Peery v. Fletcher, 43.)

Common Law—Adoption—Applicability.

2. The common law as it existed in England at the time of the settlement of the American colonies has been adopted so far only as its general principles were suited to the habits and conditions of the colonies and in harmony with the genius, spirits and objects of

American institutions, and whether common-law rules will be followed strictly depends, where no vested rights are actually concerned, upon the extent of which they are reasonable and in consonance with public policy and sentiment. (*Peery v. Fletcher*, 43.)

Common Law—Adoption.

3. In Oregon the common law of England was adopted as it existed, modified and amended by the English statutes passed prior to the Revolution. (*Peery v. Fletcher*, 43.)

See *Life Estates*, 2-4.

CONCLUSIONS OF LAW.

Conclusion Admissible as to Matter Difficult to State Otherwise.

See *Evidence*, 6.

CONCLUSIVENESS.

See *Judgment*, 4, 5.

See *Appeal and Error*, 7.

Of State Highway Engineer's Estimate.

See *Highways*, 1.

City Council's Determination as to Benefits from Improvements.

See *Municipal Corporations*, 8.

CONFIRMATION.

Without Objection to Confirmation Questions Reviewable.

See *Appeal and Error*, 15.

Service of Motion to Confirm Unnecessary.

See *Execution*, 1.

Notice to Confirm Subject to Rule of Court.

See *Execution*, 2.

CONSIDERATION.

See *Fraudulent Conveyances*, 1.

Evidence as to Execution and Consideration of Mortgage.

See *Corporations*, 1.

Necessity of Return of Consideration.

See *Release*, 1.

CONSTITUTIONAL LAW.

Constitutional Law—Impairment of Contract Right—Redemption of Mortgage.

1. Laws of 1917, page 736, amending Section 248, L. O. L., relating to redemption from mortgage sales, is inapplicable to mortgages executed prior to enactment thereof, in so far as it gives mortgagor who has sold property right to redeem, and in so far as it extends period of redemption from one year to one year and ten days, for to apply

amendment to such mortgagor would impair contract rights. (State ex rel. v. Hurlburt, 34.)

CONSTITUTION OF OREGON.

Cited and Construed in this Volume.

See Table in front of this Volume.

CONSTRUCTION.

See Statutes, 1.

See Master and Servant, 1.

Evidence as to Construction of Contract by Parties.

See Contracts, 1.

Statutes Should not be Construed Retrospectively or to Interfere With Judicial Proceedings.

See Statutes, 3.

Construction of Instructions to Jury.

See Trial, 4.

CONTEMPT.

See Appeal and Error, 30.

CONTRACTS.

Contracts—Vague Language—Construction by Parties—Evidence.

1. In an action for breach of contract, the court properly admitted evidence of its practical construction by the parties as indicated by their conduct to explain vague and uncertain language. (Fletcher v. Fischer, 265.)

See Escrows, 1.

See Evidence, 3.

See Exchange of Property, 2.

See Partnership, 4.

See Principal and Agent, 1-4.

See Specific Performance, 3, 4.

See Statute of Frauds, 2, 3.

Impairment of Contract Rights.

See Constitutional Law, 1.

District Attorney Unauthorized to Contract for Services to Ferret Out Violations of Liquor Law.

See Counties, 1, 2.

Highway Construction Contract.

See Highways, 1-9.

Exemption Statute Part of Contract for Building Dwelling.

See Homestead, 4.

Action on Bond for Paving Contracts.

See Municipal Corporations, 6.

Fraudulent Representations of Seller's Agent.

See Sales, 1.

Avoidance of Contract.

See Statute of Frauds, 3.

Rescission of Contract.

See Vendor and Purchaser, 4.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 12.

See Negligence, 2.

CORPORATIONS.**Corporations—Mortgages—Execution and Consideration—Evidence.**

1. Mortgage of corporation, which mortgage plaintiff purchased from defendant *held* duly executed for a valuable consideration. (Robinson v. Phegley, 299.)

Corporations—Mortgage—Assignment—Rights of Assignee.

2. Where plaintiff to protect her interests in a corporation purchased a \$6,000 note and mortgage from defendant upon representation that he was owner and holder in his own right, and under agreement that plaintiff was to pay dollar for dollar of what he had put into the property, and defendant concealed from plaintiff that he was to have and did receive a fee of \$2,000 out of the note and mortgage for his services as trustee, *held* defendant will be required to pay over to plaintiff the \$2,000, though the mortgage at time of purchase constituted a valid and subsisting lien on the property of the corporation. (Robinson v. Phegley, 299.)

COSTS.**Costs—Equity.**

1. In a suit in equity for an accounting, the taxing of costs is a matter within the discretion of the trial court as between the accounting parties, but third persons made defendants for the sole purpose of attaching property in their hands should be allowed costs on dismissal of the complaint: Section 567, L. O. L. (Runnells v. Leffel, 342.)

Costs—Where Statute Allows Attorney's Fee It must be Alleged and Proven.

2. A litigant upon whom the statute confers the right to an attorney's fee must allege the amount claimed and offer evidence in support of the allegation, notwithstanding that court has special knowledge of the subject. (State of Oregon v. Ganong, 440.)

Costs—Successful Party must File Verified Cost Bill.

3. Costs and disbursements cannot be allowed a successful litigant unless he pleads his costs and disbursements by filing a verified cost bill, and if the defeated litigant desires to contest the cost bill, he must do so by filing verified objections; the two verified papers constituting the pleadings. (State of Oregon v. Ganong, 440.)

Costs—Mileage for Nonresident Witnesses from State Line Allowed.

4. The court properly taxed against defendants as costs single mileage from the state line to the place of trial for plaintiff's witnesses, who came at his request from outside the state without being subpoenaed after they entered the state; it being desirable that they should testify orally to the jury, in view of the conflicting evidence. (*Kohlhagen v. Cardwell*, 610.)

See States, 1.

COUNTERCLAIM.

See Equity, 2.

COUNTIES.**Counties—District Attorney Unauthorized to Contract for Services in Procuring Evidence.**

1. Laws of 1915, Chapter 141, Section 24, requiring district attorneys to prosecute diligently persons violating the act prohibiting the sale of intoxicating liquors, and Section 25, providing for payment by the County Court of expenses and disbursements incurred therein by and under the direction of the district attorney, do not authorize a district attorney as the county's agent to make a specific contract for services in procuring evidence specifying the amount the county shall pay, in the absence of statutory provision therefor, in view of Section 937, L. O. L., placing the contract power with the County Court. (Per *JOHNS* and *MCBRIDE*, JJ.) (*Irwin v. Klamath County*, 538.)

Counties—District Attorney Unauthorized to Employ Agents to Ferret Out Violations of Liquor Law.

2. The words "expenses incurred and disbursements made by and under the direction of district attorney," in Laws of 1915, Chapter 141, Section 25, have reference to ordinary expenses, including amounts actually disbursed, or for which he made himself personally liable, such as hotel bills, railroad fare, etc., incurred while prosecuting violators of prohibition law, but does not include employment of agents by the month to travel over the county to ferret out possible offenders and gather evidence. (Per *BENNETT*, J.) (*Irwin v. Klamath County*, 538.)

Action Against County on Construction of Highway.

See Highways, 1-9.

COUNTY ROADS.

See Dedication, 1.

See Municipal Corporations, 1, 2, 3.

COURTS.**Courts—Rules of Decision—United States Supreme Court.**

1. The state Supreme Court will accept decision of United States Supreme Court upon a question arising under the Constitution of the United States, though logic of the opinion seem questionable to state court. (*State ex rel. v. Hurlburt*, 34.)

Courts—Jurisdiction—Answer to Merits.

2. Where defendant answers to the merits, court's jurisdiction over such defendant becomes complete. (*Sweeney v. Jackson County*, 96.)

Courts—"Jurisdiction of the Subject Matter"—How Conferred.

3. "Jurisdiction of the subject matter" means authority of the court to hear and determine the kind of case presented, is conferred by law, and lack of it, under Section 72, L. O. L., cannot be waived. (Duncan Lum. Co. v. Willapa Lum. Co., 386.)

Courts—Jurisdiction of Person—How Conferred.

4. Jurisdiction of a person *sui juris* depends either on proper service of summons on him or on voluntary appearance. (Duncan Lum. Co. v. Willapa Lum. Co., 386.)

Courts—"Jurisdiction" Defined.

5. "Jurisdiction" is the power to hear and decide. (Ralston v. Bennett, 519.)

May Follow Either Old or New Procedure in Opening Highway.

See Highways, 11.

Erroneous Decree of Supreme Court cannot be Set Aside by Suit to Vacate.

See Judgment, 1.

COVENANTS.

Independent Covenant.

See Vendor and Purchaser, 4.

CREDITORS.

See Fraudulent Conveyances, 2-4.

CRIMINAL LAW.

Criminal Law—Time of Trial—Congested Docket—Absent Witness.

1. Indictment returned in September will not be dismissed for failure to set case for trial during October term, to which it had been postponed on oral stipulation, due to congested condition of docket; and where motion to dismiss was not filed until accused had received notice that trial was set for December, and there was no showing that he was unprepared because of absence of witness, or who witness was, whether he was out of jurisdiction, and what he would testify. (State v. Bertschinger, 404.)

CUSTODY OF CHILDREN.

See Divorce, 1-6.

DAMAGES.

Damages—Interest—Unliquidated Claim.

1. Buyer suing seller for failure to deliver is not entitled to interest on his damages. (Duncan Lum. Co. v. Willapa Lum. Co., 386.)

See Death, 1.

See Fraud, 1.

See Principal and Agent, 3, 4.

See Sales, 3, 4.

Action for Breach of Contract.

See Sales, 2.

DEATH.**Death—Damages Recoverable Under Employers' Liability Act Limited to Prospective Earnings.**

1. Recovery for death under Employers' Liability Act, Section 4, is limited to the net amount which decedent would probably have saved from his earnings considering his age, health, ability, habits of industry, and mental and physical skill, so far as affecting his capacity for earning or rendering services or accumulating. (*Kuntz v. Emerson Hardwood Co.*, 565.)

See Master and Servant, 10-13.

DECLARATIONS.**Declarations Against Interest.**

See Evidence, 1.

DEDICATION.**Dedication—County Roads—Acceptance—Improvement.**

1. Where many years prior to the adoption of the original act incorporating municipality a highway located within the boundaries of the municipality was laid out, and the county expended money in improving the road, both before and after incorporation, there was a dedication and acceptance by the county constituting the highway a regular county road. (*Cole v. City of Seaside*, 65.)

DEEDS.**Deeds—Delivery—Evidence.**

1. In suit by a son against his mother and the other children of her and the deceased father to recover the home farm claimed to have been deeded to him in consideration of his agreement to support his parents, evidence held to show that it was not the purpose of the parents at the time of the alleged transaction to deliver their deed to the son or part with title to the property. (*Houck v. Houck*, 281.)

Deeds—Delivery.

2. Delivery of a deed, to be valid, must be such as deprives the grantor of the possession and control of the instrument. (*Houck v. Houck*, 281.)

Deeds—Delivery—Burden of Proof.

3. In suit by a son against his mother and the other children of her and her deceased husband to recover the home farm claimed to have been deeded to him in consideration of his agreement to support his parents, the burden to prove delivery of the deed to the son was upon him. (*Houck v. Houck*, 281.)

Deeds—Delivery—Intention.

4. In the absence of intention on the part of parents to deliver to their son a deed to the home farm in consideration of his agreement

to support them, there was no delivery of the deed. (Houck v. Houck, 281.)

Deposit of Deed in Bank of Vendors.

See Escrows, 1.

Right to Claim Exemption Against Deed, in Fact a Mortgage.

See Homestead, 2.

A Deed Absolute in Form, When a Mortgage.

See Mortgages, 2-5.

Presumption that Deed is Absolute may be Overcome in Equity.

See Mortgages, 6.

When Evidence is Insufficient to Show Absolute Deed a Mortgage.

See Mortgages, 7.

DEFENSES.

Inconsistent Defenses.

See Pleading, 4.

DELIVERY.

See Deeds, 1-4.

DEMURRER.

Complaint, Though Demurrable, Sufficient Against Objection not Raised Below.

See Pleading, 8.

DEPARTURE.

See Pleading, 3.

DISBARMENT.

See Attorney and Client, 1-4.

DISCRETION OF COURT.

See Appeal and Error, 19.

See Trial, 2.

DISMISSAL AND NONSUIT.

See Appeal and Error, 13.

See Equity, 1, 2.

The Granting of a New Trial After Time Limited Does not Affect Judgment of Nonsuit.

See Abatement and Revival, 1.

DISSOLUTION.

See Partnership, 3-5.

DISTRICT ATTORNEY.

Unauthorized to Contract for Services in Procuring Evidence.

See Counties, 1, 2.

DIVORCE**Divorce—Decisions Reviewable—Order Modifying Decree Awarding Custody of Infants.**

1. An order, though discretionary, granting or refusing to grant a change in the custody of infants, is appealable. (McKissick v. McKissick, 644.)

Divorce—Order Refusing Modification of Decree as to Custody of Child Reviewable.

2. Order refusing motion to modify decree as to custody of child, necessarily based on matters occurring after divorce decree, which under Section 756, L. O. L., is conclusive as to matters occurring before its rendition, is reviewable. (McKissick v. McKissick, 644.)

Divorce—Party Seeking Modification of Decree as to Custody of Child has Burden of Proof.

3. The defeated party in divorce seeking modification of decree as to custody of child has the burden of showing something by reason of which the established status should be disturbed. (McKissick v. McKissick, 644.)

Divorce—In Awarding Custody of Children Their Welfare Paramount.

4. It is the cardinal principle in awarding custody of children of divorced persons that the interest and welfare of the children are paramount to the rights and privileges of the parents. (McKissick v. McKissick, 644.)

Divorce—On Custody Awarded Mother, Placing Children in Home With Grandparents Proper.

5. The mother to whom decree of divorce awards custody of child is within her rights and duty in furnishing it with a suitable home and surroundings with her parents; she finding it necessary to take employment elsewhere to support herself. (McKissick v. McKissick, 644.)

Divorce—Modification of Decree Awarding Custody of Children to Mother Properly Denied.

6. The motion of divorced father to modify decree awarding custody of child to its mother is properly denied; he not showing that mother was unfit to have the care of it, or that its condition would be improved over its present surroundings. (McKissick v. McKissick, 644.)

DRAINAGE.

See Waters and Watercourses, 1, 3, 4.

ELECTION.**Election Between Defenses.**

See Pleading, 1, 2.

EMBLEMENTS.

See Life Estates, 1.

EMINENT DOMAIN.**Eminent Domain—State Liable for Attorney's Fee Only When Alleged and Proved.**

1. In view of Sections 577, 6860, 7424, 7434, 7442, 7448, 7459, 7495 and 7503, L. O. L., state condemning land for highway is liable for attorney's fees under Section 6868, as amended by Laws of 1913, page 81, providing for "reasonable attorney's fees to be fixed by the court at the trial" only where the attorney's fee is alleged and proved by defendant and tried by a jury where the other facts are tried by a jury. (State of Oregon v. Ganong, 440.)

Eminent Domain—State can Abandon Proceeding to Condemn Land.

2. In state's proceeding to condemn land for highway, court had no power to enter a judgment compelling payment of award, since state could have abandoned proceeding. (State of Oregon v. Ganong, 440.)

Eminent Domain—Judgment Provides for Costs and Disbursements Though Proceeding Abandoned.

3. The trial of an action in which land is condemned for public use is followed by a judgment which is made up of two distinct parts; one relating to value of land to be paid for in event land is actually taken, the other relating to costs and disbursements to which defendant is entitled, regardless of whether plaintiff does or does not take the land. (State of Oregon v. Ganong, 440.)

EMPLOYERS' LIABILITY ACT.

See Death, 1.

See Master and Servant, 10-13.

See Negligence, 2.

EQUITY.**Equity—Right to Voluntary Nonsuit—Motion Before "Trial"**

1. In view of Sections 45, 46, 102, 105, 109, 113, 114, L. O. L., under Section 182, providing that nonsuit may be given against a plaintiff on his motion at any time before trial unless a counterclaim has been pleaded in defense, made applicable to suits in equity by Section 410, plaintiff may take a voluntary nonsuit after a demurrer has been filed and disposed of; the hearing on demurrer not being a "trial" within the meaning of Section 182, which refers to trial on the merits before a jury. (State of Oregon v. Pacific Live Stock Co., 196.)

Equity—Right to Voluntary Nonsuit—Counterclaim.

2. In suit by the state to set aside and cancel deeds to state lands on the ground of fraud, affirmative defenses pleaded by defendant, insufficient, considered independent of the original bill, to give defendant ground for affirmative relief, held not such a counterclaim as to prevent plaintiff from taking a voluntary nonsuit before trial on the merits under Section 182, L. O. L., made applicable to suits in equity by Section 410. (State of Oregon v. Pacific Live Stock Co., 196.)

Equity—Equitable Principles.

3. In suit in equity, equitable rules and principles have full force. (Saling v. First Nat. Bank of Tillamook, 237.)

Equity—Maxim—Clean Hands.

4. Plaintiff, in equity suit, must come into court with clean hands. (Saling v. First Nat. Bank of Tillamook, 237.)

Equity—Maxim.

5. He who seeks equity must do equity. (Saling v. First Nat. Bank of Tillamook, 237.)

Trial of Equity Suit in Supreme Court.

See Appeal and Error, 14.

As to Allowance of Costs in Equity Suits.

See Costs, 1.

Presumption that Deed is Absolute may be Overcome in Equity.

See Mortgages, 6.

ESCROWS.**Escrows—Vendors' Deposit of Deed in Bank—Compliance with Contract.**

1. Deposit, by the vendors of a tract, in a specified bank, of deeds conveying lots to buyers of such lots from the vendees of the tract, held a full compliance by the vendors with their agreement to place such deeds in escrow in the bank, an "escrow" being an instrument importing obligation deposited with a stranger or third party, to be held until the performance of a condition, and then delivered, though the time given to some of the lot purchasers to pay extended the time beyond the contractual four-year period of payment for the whole tract. (McPherson v. Barbour, 509.)

ESTOPPEL.

See Judgment, 2, 3.

See Municipal Corporations, 4.

EVICTION.

See Landlord and Tenant, 1.

EVIDENCE.**Evidence—Workmen's Compensation—Declarations Against Interest.**

1. In an action under the Employers' Liability Act for personal injuries sustained by being caught by an unguarded shaft on a caterpillar engine, evidence by plaintiff that after the injury defendant came to him and said he had fixed the machine by putting a box over it was admissible as a declaration against interest in view of Section 727, subdivision 2, L. O. L. (Franklin v. Webber, 151.)

Evidence—Judicial Notice.

2. The courts will take judicial notice of the natural conditions of visibility early in the morning, as shown by the almanac. (Fuller v. Oregon-Wash. R. & N. Co., 160.)

Evidence—Written Contract—Sales—Negotiations.

3. Where written order constituted complete contract, evidence of letters and telephone conversation between the parties during the negotiations, whereby it was agreed that terms should be different from those contained in the written instrument subsequently signed, was not admissible. (*Duncan Lum. Co. v. Willapa Lum. Co.*, 386.)

Evidence—Rules of Employer not Printed may be Shown by Parol.

4. Anyone knowing the rules regulating employment and duties of operatives in a factory may testify thereto, they not being written or printed and the law not requiring that they should be. (*Kuntz v. Emerson Hardwood Co.*, 565.)

Evidence—Admission in Brief Binding Only as to Parties to Litigation.

5. An allegation in a brief could bind only the parties to the litigation, and not another party for whom one of the attorneys who prepared the brief was counsel. (*Welch v. Johnson*, 591.)

Evidence—Conclusion Admissible as to Matter Difficult to State Otherwise.

6. In an action on a note, which defendants claimed to have paid by the delivery of butchered hogs, it was not error to permit plaintiff's bookkeeper to testify that when she returned to the shop it would have been impossible for her to have overlooked 36 hogs, the number claimed to have been delivered, had they been there, though the testimony was in some sense a conclusion. (*Kohlhagen v. Cardwell*, 610.)

Evidence—Experiment to Determine Capacity of Wagons in Carrying Hogs.

7. In an action on a note claimed to have been paid by defendants by the delivery of 36 butchered hogs, testimony as to an experiment in loading hogs on wagons, such as defendants claimed had been used in the delivery, introduced by plaintiff, *held* admissible, in so far as it had any effect at all. (*Kohlhagen v. Cardwell*, 610.)

Evidence—Admission by Maker of Note Competent Against Stakeholder Claiming Bond for Maker.

8. Any admission or claim by makers of a note in regard to the point whether certain bonds were received by the payee bank in part payment *held* admissible, as against a disinterested stakeholder claiming title to a bond against the bank for the makers. (*Farmers & Fruit-Growers' Bank v. Davis*, 655.)

See Appeal and Error, 2, 7.

See Contracts, 1.

See Corporations, 1.

See Deeds, 1.

See Highways, 2.

See Master and Servant, 2, 4, 5, 10-13.

See Mortgages, 5, 7.

See Municipal Corporations, 6.

See Partnership, 1.

See Principal and Agent, 3, 4.

See Reformation of Instruments, 3.

See Sales, 2, 5, 6.

See Trial, 2, 3.

Rebuttal Testimony.

See Appeal and Error, 19.

District Attorney Unauthorized to Contract for Services in Procuring Evidence.

See Counties, 1, 2.

When Evidence Sustains Conviction of Using Purse-nets Unlawfully.

See Fish, 1.

Of Posting Notices for Establishment of Highway Sufficient.

See Highways, 12.

Sufficient to Authorize Correction of Survey.

See Public Lands, 1.

Evidence as to Part Performance.

See Specific Performance, 1, 2.

When Evidence Shows Sale in Gross.

See Vendor and Purchaser, 1.

When Evidence Shows No Fraudulent Representations.

See Vendor and Purchaser, 2.

EXCEPTIONS, BILL OF.**Exceptions, Bill of—Sufficiency of Bill Containing Transcript of All the Evidence.**

1. Bill of exceptions portraying all proceedings of the trial, and certified to by the trial judge, to which a transcript of all the evidence was attached, held sufficient. (*Farmers & Fruit-Growers' Bank v. Davis*, 655.)

EXCHANGE OF PROPERTY.**Exchange of Property—"Barter."**

1. A "barter" or "exchange of properties" occurs where one article is exchanged for another; no price in money being fixed upon either. (*Hartwig v. Rushing*, 6.)

Exchange of Property—Time for Adjusting Commissions Identical With Period for Making Exchange.

2. Contract for exchange of properties, though providing that it may be declared canceled if a satisfactory adjustment of the real estate agent's commission cannot be effected, not providing any time therefor, time for adjustment is identical with the period named for making the exchange. (*Kaufman v. Hastings*, 623.)

EXECUTION.**Execution—Service of Motion to Confirm Sale Unnecessary.**

1. Section 241, subdivision 2, L. O. L., as amended by Laws of 1917, page 64, requires the court to allow the order confirming sale, unless upon hearing it satisfactorily appears that the sale proceedings were

substantially irregular to the probable injury of the objector, and service upon the judgment debtors of a motion to confirm is not required by statute, and, where they had knowledge of the final decree directing sale, they cannot be heard to complain of not being served. (Roseburg Nat. Bank v. Camp, 339.)

Execution—Notice to Confirm Sale of Land Subject to Rule of Court.

2. A court, granting an order of confirmation of sale of real property, may construe its own rules as to requiring service of motion to confirm sale of real property upon the judgment debtor. (Roseburg Nat. Bank v. Camp, 339.)

EXEMPTION.

Claiming Exemption from Judicial Sale.

See Homestead, 1-4.

FACTORS.

Factors—Brokers—Status of Sales Agent.

1. Sales agent for cereal manufacturers, as to a stock of goods kept in a particular city, from which sales were made, *held* a factor, while as to shipments made from another point where the manufacturer's mill was located he was a broker, having been in both classes of transactions an agent acting on a *del credere* commission, since he guaranteed all accounts. (Fletcher v. Fischer, 265.)

FACTORY ACT.

See Master and Servant, 10-13.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Negligence, 1.

FINDINGS.

See Appeal and Error, 33.

FISH.

Fish—When Evidence Sustains Conviction of Using Purse-nets Unlawfully.

1. Where parties convicted of violating Laws of 1917, page 403, Section 2, stipulated that, in purse-net fishing, removing the net from the water and emptying it of the catch of fish is a necessary part of the fishing operation, one permitting his seine to drift with the tide across the dead-line into the forbidden territory, and there causing same to be lifted from the water to the vessel, is guilty of violation of such statute, although the fish entered the seine outside of the forbidden territory and the seine was closed before drifting across the line. (State v. Marco, 333.)

FRAUD.

Fraud—Right to Recover—Injury.

1. The seller of furniture in a rooming-house to one who paid in cash and note secured by mortgage could not recover damages from the purchaser and another, charged to have conspired to create a pre-

tended security, by execution of mortgage without actual consideration, unless he suffered some injury. (*Martin v. Moreland*, 61.)

See Partnership, 3.

See Release, 1.

Fraudulent Representations of Seller's Agent.

See Sales, 1.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyances—Bulk Sales Law—Applicability—Consideration—"Sale."

1. Construed as a whole, bulk sales law (Sections 6069-6072, L. O. L.), applies, not only to sales for money, but also to sales for property measured in money; "sale or transfer" being spoken of, and direction being given for acts "before paying or delivering * * any part of the purchase price or consideration." (*Hartwig v. Rushing*, 6.)

Fraudulent Conveyances—Bulk Sales Law.

2. Bulk sales law (Sections 6069-6072, L. O. L.) is not limited to protection of mercantile creditors only; it speaking of "all of the creditors," "all of his creditors," and "any and all creditors." (*Hartwig v. Rushing*, 6.)

Fraudulent Conveyances—Bulk Sales Law—Creditors Entitled to Notice.

3. Bulk sales law (Sections 6069-6072, L. O. L.) requires notice to creditors whose demands are not yet due; statement required of seller being of all creditors, with amount of indebtedness due or owing, or to become due or owing. (*Hartwig v. Rushing*, 6.)

Fraudulent Conveyances—Bulk Sales Law—Remedy of Creditors—Purchaser from Grantee.

4. A sale without compliance with bulk sales law being by provision of Section 6070, L. O. L., conclusively presumed fraudulent and void, a trust in favor of creditors of the seller, he being without assets and they having reduced their claim to judgment, entitling them to equitable remedy, will be impressed on land obtained by the buyer of the stock of goods in exchange therefor, and then conveyed to others without consideration. (*Hartwig v. Rushing*, 6.)

GOOD FAITH.

See Partnership, 2.

GOVERNOR.

Succession to Office in Case of Death of Governor.

See States, 1.

GRANDPARENTS.

Placing Children in Home With Grandparents Proper.

See Divorce, 5.

HARMLESS ERROR.

See Appeal and Error, 6, 18.

HIGHWAYS.**Highways—Construction Contract—Conclusiveness of Engineer's Estimate.**

1. Stipulation in road building contract that state highway engineer's estimate as to work done and value therefor to be paid by county is of essence of contract, and in absence of fraud or gross mistake implying bad faith or failure to exercise honest judgment is binding upon both parties as to disputes subsisting and open to arbitration. (*Sweeney v. Jackson County*, 96.)

Highways—Construction—State Highway Engineer's Estimate—Errors—Sufficiency of Evidence.

2. Evidence held to show such gross and palpable errors in classifying and estimating the amount of work performed under road building contract making state highway engineer's estimate final, that it was impossible for state highway engineer's final estimate to be the result of the exercise of honest judgment. (*Sweeney v. Jackson County*, 96.)

Highways—Construction—State Highway Engineer's Estimate—Errors—Correction.

3. Where state highway engineer's final estimate of work performed under contract making such estimate final showed such gross and palpable errors that it was impossible for result to be the exercise of honest judgment, the estimate should be set aside and corrected. (*Sweeney v. Jackson County*, 96.)

Highways—Construction—Contractor's Compensation—Engineer's Estimate—Errors.

4. State highway engineer's estimate of work performed under contract making such estimate final is only *prima facie* correct, and where it appears that that estimate is not fair, and is result of reports of incompetent subordinates and not of an impartial hearing and determination, equity will set aside estimate and determine contractor's compensation. (*Sweeney v. Jackson County*, 96.)

Highways—Construction—Compensation of Contractor—Extra Work.

5. Where contract contemplated work to be performed during summer, but because of right of way complications contractor was required to postpone work until winter months and because thereof and by reason of change of plans was required to do considerable work not contemplated by contract, he could recover therefor under stipulation in contract providing for additional compensation for extra work. (*Sweeney v. Jackson County*, 96.)

Highways—Construction of Contract—"Earth."

6. The word "earth," within highway construction contract providing for contractor's compensation for removal thereof embraced clay, sand, loam, gravel and all hard material that can, in opinion of engineer, be reasonably plowed, and all earthy matter or earth con-

taining loose stones or boulders intermixed and all other material that does not come under the classification of hard-pan, loose rock, solid rock, shell rock and solid rock borrow. (*Sweeney v. Jackson County*, 96.)

Highways—Construction of Contract—"Hard-pan."

7. The term "hard-pan," within road building contract providing for contractor's compensation for removal thereof, includes material, not loose or solid rock, that cannot in the opinion of the engineer be reasonably plowed on account of its own inherent hardness. (*Sweeney v. Jackson County*, 96.)

Highways—Construction of Contract—"Earth"—"Hard-pan"—"Adobe."

8. Where road building contract provides for compensation for removal of "earth" and "hard-pan" but not for "adobe," and where there was evidence that adobe could not be practically plowed or blasted out, adobe will not be classed as earth or hard-pan, and contractor will be given reasonable cost of excavating it. (*Sweeney v. Jackson County*, 96.)

Highways—Contracts—Action.

9. In an action by a highway contractor against a county, evidence held sufficient to establish his claim for additional compensation, etc. (*Sweeney v. Jackson County*, 96.)

Highways—Saving Clause of Repealing Statute Preserves All Road Improvements Pending.

10. The saving clause of the County Road Act of May, 20, 1917, providing that, notwithstanding repeal of existing statutes, such statutes should continue in force for purposes of completion of any highway proceedings previously instituted, covers the case of a highway proceeding instituted under Laws of 1903, page 264, Section 11 (Sections 6284-6286, L. O. L.), the intention of the legislature having been to preserve all pending proceedings for establishment of roads. (*Rice v. Douglas County*, 551.)

Highways—When Court Opening Highway may Follow Old or New Procedure.

11. In view of the saving clause of the highway statute of May 20, 1917, after the going into effect of such new statute, repealing prior statutes, the County Court, in opening a county road, could follow either the old or the new procedure in a pending proceeding instituted under the old statutes. (*Rice v. Douglas County*, 551.)

Highways—When Evidence of Posting of Notices for Establishing Highway Sufficient.

12. In a proceeding to establish a county road, instituted under Laws of 1903, page 264, Section 11 (Sections 6284-6286, L. O. L.), and continuing under the new and repealing statute of May 20, 1917 (Laws 1917, p. 588), posting of notices in three public and conspicuous places in the vicinity of the road, and one on the bulletin-board at the county courthouse, held a compliance with law, so that an affidavit stating that one copy of the notice was posted in a public and conspicuous place near the center of the proposed road was suffi-

cient proof, the center of a road being a point in the middle of the road equidistant from the termini. (Rice v. Douglas County, 551.)

Highways—When Notes of Viewers and Surveyor Sufficient.

13. Where field-notes of the county surveyor and viewers of a proposed county road showed the beginning point and terminus of the road, and every angle, direction and distance between the point of beginning and the terminus, their preliminary report substantially complied with the act of May 20, 1917 (Laws 1917, p. 588), and the road was duly established by order to that effect; the placing of permanent monuments, etc., not being necessary to constitute the road a public highway, while failure to make final survey and to monument the road does not avoid the order of establishment. (Rice v. Douglas County, 551.)

Highway—Right to Review Establishment not Waived by Appeal from Assessment.

14. The right to review proceedings to establish a county road or highway is not waived by an appeal from the assessment of damages to premises through which the road is laid out. (Rice v. Douglas County, 551.)

Highways—Qualification of Viewers Sufficiently Shown by Report.

15. The recital in the report of viewers of a proposed county road or highway that before commencing their labors they took an oath faithfully and impartially to discharge the duties of their appointment is sufficient showing that the viewers qualified as required. (Rice v. Douglas County, 551.)

In Case Condemnation Proceedings are Abandoned by State.

See Eminent Domain, 2, 3.

Filing Report of Establishment of Highway Day After Holiday is Sufficient.

See Time, 1.

HOLIDAY.

Filing of Report Establishing Highway Day After Holiday is Sufficient.

See Time, 1.

HOMESTEAD.

Homestead—When Owner of Homestead Erecting House Thereon and Entering It can Claim Exemption.

1. Under Section 221, L. O. L., declaring family homestead exempt from judicial sale for satisfaction of any judgment, and requiring only that it must be the actual abode of, and owned by, such family, or a member thereof, and Section 224, providing that when an officer shall levy on it the owner may notify him that he claims it as his homestead, the owner of land, a member of a family, contracting for erection of a house thereon, while living with her family on rented premises, but moving into the house before foreclosure of liens for labor and material entering into it, may claim exemption against execution on foreclosure decree, having done nothing to lose or waive homestead right. (Paulson v. Hurlburt, 419.)

Homestead—Right to Claim Against Deed in Fact a Mortgage.

2. One's right to claim homestead exemption is not affected by her executing an instrument on its face an absolute conveyance of the property; it being accompanied by a defeasance in writing showing it was a security as to certain claims, and so constituted a mortgage, not divesting title from grantor. (Paulson v. Hurlburt, 419.)

Homestead—Exemption Statute Applying to Decrees not Affected by Codification.

3. The homestead exemption statute does not lose its natural effect, standing by itself, as a remedial statute, of applying to decrees, though in terms exempting from judicial sale for satisfaction of any judgment, because put in Sections 221-226, L. O. L., while Section 415 provides that Sections 213-220, which apply to the constituent elements of executions, and Sections 227-258, which cover exemptions as they were codified before enactment of the homestead statute, shall apply to enforcement of a decree, so far as its nature may require or admit of it. (Paulson v. Hurlburt, 419.)

Homestead—Exemption Statute Becomes Part of Contract for Building Dwelling.

4. The homestead exemption statute, Sections 221-226, L. O. L., existing when contract for erection of a dwelling is made, enters into it, and so makes it part of the contract that exemption may be claimed against execution on decree foreclosing lien for labor and material entering into the building. (Paulson v. Hurlburt, 419.)

HUSBAND AND WIFE.**Contract of Married Man Relating to Realty Enforceable Against Him.**

See Specific Performance, 4.

IDEM SONANS.

See Names, 1.

IMPROVEMENTS.

See Dedication, 1.

See Municipal Corporations, 3-5.

City Council's Determination as to Benefits Conclusive.

See Municipal Corporations, 8.

INCONSISTENT STATEMENTS.

See Pleading, 2.

INDEPENDENT COVENANT.

See Vendor and Purchaser, 4.

INJUNCTION.

See Appeal and Error, 20-30.

INNOCENT PURCHASER.

See Attachment, 1.

INSTRUCTIONS.

- See Insurance, 1.
- See Master and Servant, 7.
- See Principal and Agent, 1.
- See Sales, 1.
- See Trial, 1, 3, 4.
- See Waters and Watercourses, 1, 3, 4.

INSURANCE.**Insurance—Authority of Agent to Receive Premiums—Instructions.**

1. An instruction relative to authority of a general state agent of an insurance company to accept payment of premiums, "but you are further instructed that, if the officers had an opportunity to inform themselves of the facts and circumstances * * and failed to do so, it would be equivalent to such knowledge," was erroneous, being too broad; the mere opportunity to acquire knowledge not being equivalent to knowledge. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Authority of Agent—Payment of Premiums.

2. Where an insurance company ratified the unauthorized act of a general state agent in accepting notes in payment of premiums and granting extensions, it became a question of fact as to whether the company, by such acts and conduct, had authorized and empowered the general agent to make and accept other premium notes and grant other extensions. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Authority of Agent—Question for Jury.

3. In an action against an insurance company to recover premiums paid, where insurance company had cancelled the policies, whether defendant's general state agent had apparent authority to accept premium notes and grant extensions, contrary to the provisions of a life policy, *held* for the jury. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Life Insurance—Failure to Pay Premiums.

4. Where the premium on a life insurance policy is not paid when due, and the payment thereof is not waived or extended by the insurer, the insurer may cancel the policy and retain premiums paid. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Life Insurance—Failure to Pay Premiums—Lapse of Policy.

5. If a renewal premium was paid or extended by the execution of a premium note, and such note was not paid at maturity or at time to which it was extended, if extended, the insurer could cancel the policy. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Failure to Pay Premiums.

6. A policy of life insurance automatically lapses without any further action on the part of the insurer, if the insured fails to pay a premium when the same becomes due, and within the time allowed by the terms of the policy. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Life Insurance—Time.

7. Time is of the essence of a life insurance contract, and if insured fails to perform any condition on the date when it is due to be performed, then, without any further notice or act of the insurer, the policy lapses automatically, where no leeway or days of grace are allowed the insured. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Insurance Agent's Authority—Receiving Premiums.

8. To establish that an agent outside of the home office of the insurance company had authority to accept renewal premiums on behalf of the company, it must be proved that either such agent was actually authorized by insurance company, or by his contract from the home office, or that the insurance company represented or held out the agent as having the authority; and also that the insured knew of and relied on the representations. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Authority of Agent—Ratification of Unauthorized Act.

9. No payment of premiums to other than an authorized agent of an insurance company, or one held out as having authority, can be considered as a valid premium payment, unless the same was actually received by and consented to and ratified by the insurer. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Agency—Proof—Declarations of Agent.

10. A declaration or statement made by an agent of an insurance company to the effect that he is authorized to collect premiums is of no effect and not binding upon the company. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Wrongful Cancellation of Policy—Recovery of Premiums—Amount.

11. If an insurance company wrongfully declared a policy forfeited and refused to accept a premium when duly tendered, the insured may consider the policy at an end and bring an action to recover the just value of the policy, in which case the measure of damages is the amount of premiums paid with interest on each from the time it was made. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Limitation of Authority—Validity.

12. Provisions in a life insurance policy to effect that agents shall not have authority to collect renewal premiums, and that company shall not be responsible for act of agent in accepting notes and extending payment thereon, are valid and binding between the insurer and the insured. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Limitation of Authority of Agent—Waiver.

13. Provisions in a policy of life insurance limiting authority of agent and providing that agent has no authority to accept renewal premiums or accept notes, or grant extensions, etc., may be waived or modified by the insurer. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

Insurance—Application for Liability Policy Presumably for Ordinary Policy.

14. Where application was made for employer's liability policy without going into any details as to the conditions to be placed in the

policy, it will be presumed that the ordinary form of policy was to be used. (*Peninsula Lum. Co. v. Royal Indemnity Co.*, 684.)

Insurance—Statement as to Other Insurance Construed as Absolute.

15. Insured's statement that no insurance of specified kinds "has been declined, nor has any such insurance been canceled or the renewal thereof refused, except as follows," if followed by no exception, must be taken to be absolute, since it is incumbent upon insured to qualify statement if there is an exception, the exception being presumably within his knowledge, and the legal effect of such unqualified statement, where exception is within knowledge of insured, but unknown to insurer, being same as if words "no exception" followed. (*Peninsula Lum. Co. v. Royal Indemnity Co.*, 684.)

INTENT.

Absence of Intention to Deliver Deed.

See Deeds, 4.

Of Parties Executing Deed to Operate as Security.

See Mortgages, 2.

Of Legislature as to Adopted Statute of Another State.

See Statutes, 1.

INTEREST.

See Damages, 1.

INTOXICATING LIQUORS.

District Attorney Unauthorized to Employ Agents to Ferret Out Violations of Liquor Law.

- See Counties, 1, 2.

IRRIGATION DISTRICTS.

Exclusion of Land from Irrigation District.

See Appeal and Error, 2.

Sufficiency of Notice for Organization.

See Notice, 1, 2.

See Waters and Watercourses, 5-11.

JOINDER.

See Parties, 1.

JUDGMENT.

Judgment—Erroneous Decree of Supreme Court cannot be Set Aside by Suit to Vacate.

1. An erroneous decree of the Supreme Court cannot be set aside, merely because erroneous, by an original suit, where the court had jurisdiction of the parties and of the cause. (*Ralston v. Bennett*, 519.)

Judgment—No Necessity to Plead Estoppel by Judgment not Relied on as Bar.

2. The rule that an estoppel by judgment to be available must be pleaded does not apply where the judgment, instead of being relied on as a bar to the action, is sought to be introduced in evidence merely as conclusive of some particular fact previously adjudicated. (*Farmers & Fruit-Growers' Bank v. Davis*, 655.)

Judgment—Effect as Estoppel in Subsequent Litigation.

3. While the doctrine of the effect of a judgment as an estoppel in a subsequent action is limited to matters involved in the litigation, it is generally held to be equally applicable whether the point decided is the ultimate vital point, or only incidental, if necessary to decision of the ultimate point. (*Farmers & Fruit-Growers' Bank v. Davis*, 655.)

Judgment—Conclusiveness in Subsequent Litigation as to Matters Necessarily Though not Directly Determined.

4. Judgment in a prior suit is deemed final and conclusive in subsequent litigation between the parties or their privies as to a matter necessarily determined or implied in reaching the final judgment, though no specific finding may have been made thereon, and even though it was not raised as an issue by the pleadings. (*Farmers & Fruit-Growers' Bank v. Davis*, 655.)

Judgment—Conclusiveness as to Person Standing in Shoes of Parties Defendant.

5. Judgment in action by payee of note against the makers held conclusive, in the payee's action to recover a bond from the person holding it in the right of the makers, as to whether bonds had been paid for by the payee, so that it acquired title to them. (*Farmers & Fruit-Growers' Bank v. Davis*, 655.)

See *Eminent Domain*, 8.

JUDICIAL NOTICE.

See *Evidence*, 2.

JUDICIAL SALE.**Claiming Exemption from Judicial Sale.**

See *Homestead*, 1-4.

JURISDICTION.

See *Appeal and Error*, 15, 22, 28, 30.

See *Courts*, 2.

Filing of Transcript Within Statutory Time or Extension Thereof Jurisdictional.

See *Appeal and Error*, 39.

Of the Subject Matter and of the Person.

See *Courts*, 3, 4.

As to Organization of Irrigation Districts.

See *Waters and Watercourses*, 5, 11.

LANDLORD AND TENANT.**Landlord and Tenant—Payment of Rent—Constructive Eviction.**

1. There cannot be a constructive eviction without a surrender of possession, and the tenant will not be permitted to remain in possession and escape payment of rent by pleading a state of facts which, though conferring a right to abandon, has not been accompanied by the exercise of that right. (*Peery v. Fletcher*, 43.)

LEASE.**Apportionment of Rent upon Death of Life Tenant.**

See *Life Estates*, 1-4.

LIABILITY.**For Diversion or Change of Natural Stream.**

See *Waters and Watercourses*, 2, 3, 4.

LIEN.**Claiming Exemption Against Execution Foreclosing Lien for Labor and Material.**

See *Homestead*, 4.

LIFE ESTATES.**Life Estates—Lease—Emblements—Rights of Undertenant.**

1. Where a life tenant has leased land for the term of his life for a money rent payable annually, the doctrine of emblements applies with full force to the undertenant; he having even greater privileges than his lessor, the life tenant whom he represents. (*Peery v. Fletcher*, 43.)

Life Estates—Lease by Life Tenant—Death of Lessor—Apportionment of Rent.

2. At common law, where a life tenant leases the estate for a term of years at a yearly rent and dies before one of the rent days, the rent cannot be apportioned, and the tenant could quit free of rent from the last rent day; neither the personal representatives of the lessor nor the reversioner having power to collect the rent. (*Peery v. Fletcher*, 43.)

Life Estates—Lease—Apportionment of Rents—Effect of Death of Life Tenant—Common-law Rules—Adoption.

3. The common law of England as modified by Statute of 11 Geo. II, c. 19, Section 15, giving an executor or administrator of a life tenant, on whose death a lease granted by him had determined, the right to recover of the tenant a ratable portion of the rent from the last day of payment to the death of lessor, being reasonable and suited to the conditions and customs of the state and not conflicting with the Constitution or statutes thereof, was adopted as part of the common law of the state. (*Peery v. Fletcher*, 43.)

Life Estates—Lease—Death of Life Tenant—Apportionment of Rent Due to Life Tenant by Subtenant.

4. Where a life tenant leased the property for the period of the life tenancy for a money rent payable annually and died before annual

crops had matured and before the annual rent for that year was due, the rent could be apportioned between the life tenant's personal representatives and the reversioner as to time, in view of Sections 7169, 7170, L. O. L., modifying the common-law rule that such rents could not be apportioned. (*Peery v. Fletcher*, 43.)

LIFE INSURANCE.

See Insurance.

LIFE TENANT.

Effect of Death of Life Tenant.

See Life Estates, 1-4.

MASTER AND SERVANT.

Master and Servant—Workmen's Compensation—Statutes—Construction—"Shaft."

1. Employers' Liability Act, providing that "shafts, wells, floor openings and similar places of danger shall be inclosed" in its reference to "shafts" contemplates openings in the ground or in structures, and not revolving shafts in machinery. (*Franklin v. Webber*, 151.)

Master and Servant—Workmen's Compensation—Evidence—Subsequent Repairs or Alterations.

2. In an action under the Employers' Liability Act for injuries to an employee caught in an unguarded shaft on a caterpillar engine, it was competent to show the subsequent installation of a guard over such shaft to demonstrate the practicability of guarding the shaft without impairing the efficiency of the machine. (*Franklin v. Webber*, 151.)

Master and Servant—Rules—"Under Control"

3. Where rules of a railroad company required a train entering a block occupied by another train to proceed under control at a speed not exceeding six miles an hour, the words "under control" mean ability to stop within the distance the track is seen to be clear. (*Fuller v. Oregon-Wash. R. & N. Co.*, 160.)

Master and Servant—Injuries to Servant—Evidence—Sufficiency.

4. In action for death of a rear-end trainman, killed in a collision, evidence *held* sufficient to carry to jury question of negligence of railroad company. (*Fuller v. Oregon-Wash. R. & N. Co.*, 160.)

Master and Servant—Injuries to Servant—Evidence—Sufficiency.

5. In an action for death of a rear-end trainman, killed in a collision, evidence *held* insufficient to show that his negligence was the sole cause of his death. (*Fuller v. Oregon-Wash. R. & N. Co.*, 160.)

Master and Servant—Injuries to Servant—Assumption of Risk.

6. While the defense of assumption of risk is available under the Federal Employers' Liability Act (U. S. Comp. Stats., §§ 8657-8665), it does not apply to extraordinary hazards created by the negligence of a fellow-servant. (*Fuller v. Oregon-Wash. R. & N. Co.*, 160.)

Master and Servant—Injuries to Servant—Instruction—Presumptions.

7. In an action for the death of a rear-end brakeman, killed in a collision, an instruction that the burden of proving contributory negli-

gence was on the railroad company, and that there was a presumption that he exercised reasonable care, *held* correct. (Fuller v. Oregon-Wash. R. & N. Co., 160.)

Master and Servant—Injuries to Servant—Jury Question.

8. In an action under Federal Employers' Liability Act (U. S. Comp. Stats., §§ 8657-8665), for death of a rear-end brakeman, killed in a collision with a following train, an instruction submitting to the jury the question whether the company was negligent in operating the following engine backward without a headlight, required by rules of the Interstate Commerce Commission, *held* proper. (Fuller v. Oregon-Wash. R. & N. Co., 160.)

Master and Servant—Injuries to Servant—Question for Jury.

9. In an action for the death of railroad employee killed in a collision, the question whether the tail lights on the caboose in which he was riding were burning, *held* under the evidence for the jury. (Fuller v. Oregon-Wash. R. & N. Co., 160.)

Master and Servant—Whether Employee was at Work in Scope of Employment Question for Jury.

10. Under the evidence, in action for death of employee, *held* that it was a question for the jury whether he, in going from his place as an off-bearer for a rip-saw to another place in the same room to put on a belt was within the scope of his employment. (Kuntz v. Emerson Hardwood Co., 565.)

Master and Servant—Evidence of Want of Rules in Factory not Objectionable for Remoteness.

11. It was permissible, in an action for death of employee in putting on a belt, to show that eight months before the accident there were no rules or regulations in the factory regarding adjustment of the belt, objection of remoteness going rather to its weight than its competency. (Kuntz v. Emerson Hardwood Co., 565.)

Master and Servant—Disregard of Warning Evidence of Contributory Negligence.

12. As tending to show contributory negligence, as basis for reduction of damages under Employers' Liability Act, master may show that when deceased started to put on belt he was warned, by the man in charge of the saw at which he worked, not to put it on, but to leave it alone. (Kuntz v. Emerson Hardwood Co., 565.)

Master and Servant—Labor Commissioner's Certificate Evidence That Employer Complied With His Duty Within Factory Act.

13. Defendant, in an action under Employers' Liability Act for death of a servant in putting on a belt, was entitled to have admitted the labor commissioner's certificate for the year, that the factory conformed to the Factory Act, Section 5040, L. O. L., et seq., as *prima facie* evidence of performance of master's duties to the extent required by the Factory Act. (Kuntz v. Emerson Hardwood Co., 565.)

MAXIMS.

See Equity, 4, 5.

MEASURE OF DAMAGES.

See Sales, 3, 4.

MECHANICS' LIENS.

Exemption may be Claimed Against Execution Foreclosing Lien.

See Homestead, 4.

MISTAKE.

See Appeal and Error, 36.

See Reformation of Instruments, 1-4, 6-9.

Reinstatement of Mortgage Satisfied by Mistake.

See Mortgages, 8.

See Vendor and Purchaser, 5.

Mortgagee cannot Urge Assumption Clause Inserted by Mistake.

See Mortgages, 9.

MODIFICATION.

Of Decree in Suit After Divorce.

See Divorce, 1-6.

MORTGAGES.

Mortgages—Redemption—Retroactive Statute.

1. A state statute, which authorizes the redemption of property sold on foreclosure of a mortgage where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage. (State ex rel. v. Hurlburt, 34.)

Mortgages—Absolute Deed—Intent.

2. A deed absolute in form, or any other conveyance, must be construed to be a mortgage subject to redemption, where it is made manifest from a consideration of all surrounding facts and circumstances that the parties thereto intended the conveyance to operate only by way of security. (Smith v. Headlee, 257.)

Mortgages—Absolute Deed—Burden of Proof.

3. The burden of proof rests upon one claiming that a deed absolute in form is a mortgage to show the real character of the transaction; the presumption existing that a deed absolute on its face is what it purports to be. (Smith v. Headlee, 257.)

Mortgages—Absolute Deed—Character of Instrument—Security.

4. A deed absolute on its face is a mortgage if a pre-existing debt in relation to which it was given was not extinguished, or if a new debt was intended to be created and the conveyance was given as security therefor. (Smith v. Headlee, 257.)

Mortgages—Absolute Deed—Evidence.

5. In action to have a deed absolute in form declared a mortgage, evidence held to show that the deed was executed only as security for

a pre-existing debt and for advances to be made. (Smith v. Headlee, 257.)

Mortgages—Presumption That Deed is Absolute may be Overcome in Equity.

6. The presumption is that a deed absolute upon its face is what it purports to be, and is intended as an absolute conveyance; but this presumption may be overcome in a proper case in a court of equity by evidence that the transaction was really a loan and that the deed was intended as a mortgage only. (Mays v. Robert Mays Estate Co., 502.)

Mortgages—When Evidence Insufficient to Show Absolute Deed a Mortgage.

7. Evidence held insufficient to sustain claim that an absolute deed was intended as a mortgage to secure a loan from grantee to his brother, and that grantee agreed to convey property to brother on brother's repayment of loan. (Mays v. Robert Mays Estate Co., 502.)

Mortgages—Reinstatement of Mortgage Satisfied by Mistake.

8. When the owner of two mortgages, intending to satisfy one, by mistake satisfies the other mortgage, he is entitled to have the mistake corrected and the mortgage reinstated, unless right of third parties would be prejudiced. (Dennison v. Jossi, 581.)

Mortgages—Mortgagee Cannot Urge Assumption Clause Inserted by Mistake.

9. Mortgagee cannot avail himself of assumption clause inserted through mistake or oversight of the scrivener, and without the knowledge or consent of either grantor or grantee. (Welch v. Johnson, 591.)

Mortgages—Trust Deed to Secure Debt Conveys Legal Title Only to Enforce Trust.

10. Under the laws of California, a trust deed to secure a specified debt, amounts only to an encumbrance, and conveys the legal title to the trustee only in so far as may be necessary to the execution of the trust. (Kaufman v. Hastings, 623.)

Mortgages—What Constitutes "Purchase-money Mortgage" Entitled to Priority of Liens.

11. Generally, mortgage executed by purchaser contemporaneously with acquirement of legal title, or afterwards as part of same transaction, is a "purchase-money mortgage," regardless of whether executed to vendor or third person, and entitled to preference as such over all other claims or liens arising through the mortgagor though prior in point of time. (Ladd & Tilton Bank v. Mitchell, 668.)

Mortgages—What Constitutes "Mortgage to Secure Payment of the Balance of the Purchase Price."

12. A mortgage executed to "secure payment of the balance of the purchase price," within Section 426, L. O. L., providing that upon foreclosure of such mortgage, mortgagee shall not be entitled to deficiency judgment against purchaser, is a mortgage given concurrently with a conveyance of land, by purchaser to vendor, on the same land, to secure the unpaid balance of the purchase price, and a mortgage

executed by purchasers to vendor's mortgagee in consideration of the latter's release of the land purchased from its mortgage is not within the statute. (*Ladd & Tilton Bank v. Mitchell*, 668.)

See Corporations, 1, 2.

See Vendor and Purchaser, 5, 6.

Mortgage Assigned to Holders in Due Course cannot be Reformed.

See Reformation of Instruments, 5.

MOTION.

See Equity, 1.

See Execution, 1, 2.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Streets—County Roads—Control by City.

1. Although a county road may traverse land within the limits of an incorporated city or town, yet, unless the state through its legislative department, or the county as the agent of the state, employing procedure prescribed by statute, surrenders authority over the road, the city cannot assume control. (*Cole v. City of Seaside*, 65.)

Municipal Corporations—Streets—County Road.

2. The mere fact that the county road is embraced within the boundaries of a recently created municipality does not *ipso facto* make it a city street. (*Cole v. City of Seaside*, 65.)

Municipal Corporations—Street Improvements—Powers of—County Road—Authority.

3. Mere consent will not confer jurisdiction upon a tribunal having limited authority in matters where it has no power to conduct such proceeding, and therefore consent of abutting owners to the improvement of a county road within its limits does not give the municipality jurisdiction to order such improvement. (*Cole v. City of Seaside*, 65.)

Municipal Corporations—Public Improvements—Estoppel of Abutting Owner—Assessments.

4. Where municipal authorities ordered the improvement of county road within its boundaries, the fact that an abutting owner, in remonstrating or protesting against the improvement, referred to the road as a street, using the same language that was used by the council in the ordinance ordering the improvement, does not estop such property owner from denying the authority of council to order the improvement. (*Cole v. City of Seaside*, 65.)

Municipal Corporations—Road Improvements—Council Authority.

5. While the electors of a municipality may, pursuant to Article XI, Section 2, of the Constitution through the exercise of initiative power conferred in Article IV, Section 1a, amend the charter, such power does not authorize a municipality to do anything not strictly forbidden, and to warrant a municipality in improving a county road such power must be plainly disclosed by the terms of its charter, which must be strictly construed. (*Cole v. City of Seaside*, 65.)

Municipal Corporations—Paving Contracts—Guaranty of Work—Action on Bond—Evidence—Sufficiency.

6. In an action on an undertaking executed by a paving company and an accident and liability company insuring faithful performance of a pavement contract and providing for the repair of defects attributable to defective workmanship or material within five years, the mere fact that the top or wearing surface of the pavement wore out, leaving the concrete base to disintegrate, *held* not sufficient evidence to justify a finding of defective materials and workmanship. (Dallas City v. Aetna Accident Co., 148.)

Municipal Corporations—Questions of Law and Fact not Reviewable on Writ of Review.

7. In writ of review proceeding to set aside street improvement proceedings and assessment of the expense thereof, the court will not consider question whether the street improved was a part of a bridge approach; such question being a question of fact, or mixed law and fact, not reviewable under writ of review. (Killingsworth v. Portland, 525.)

Municipal Corporations—City Council's Determination as to Benefits from Improvement Conclusive.

8. In writ of review proceedings to set aside street improvement proceedings, court will not review question of whether property assessed was actually benefited, or whether apportionment of cost made by assessment was just or fair; the city council's determination as to benefits being conclusive. (Killingsworth v. Portland, 525.)

Municipal Corporations—Viaduct may be Constructed as Part of Street Improvement.

9. Amended Portland City Charter of 1913, Section 190, subdivisions 1-4, providing in subdivision 4, that council "shall" levy tax for construction of bridge to cost more than \$15,000, does not preclude council from providing for construction of viaduct, as part of street, at cost of more than \$15,000, by assessment under old charter Sections 373 and 374, incorporated into amended charter by Section 284 of amended charter. (Killingsworth v. Portland, 525.)

NAMES.

Names—Idem Sonans.

1. Mortgage foreclosure complaint and decree of sale, describing property as in "Blackistone Addition," was not fatally defective, though mortgage described property as in "Blackstone addition"; "Blackistone" and "Blackstone" being *idem sonans*. (State ex rel. v. Hurlburt, 34.)

NEGLIGENCE.

Negligence—Comparative Negligence—Injuries to Servants—Federal Employers' Liability Act.

1. Under the Federal Employers' Liability Act (U. S. Comp. Stats., §§ 8657-8665), contributory negligence goes only to the question of damages, and is not a defense. (Fuller v. Oregon-Wash. R. & N. Co., 160.)

Negligence—Contributory Negligence Reduces Recovery Under Employers' Liability Act.

2. For an employee to go from his place as an off-bearer for a rip-saw to another place in the room to put on a belt, in doing which he was killed, was at most contributory negligence, which under Employers' Liability Act, Sections 1, 4, 6, merely reduces recovery for his death from failure of the employer to use every means practicable for protecting life from machinery. (*Kuntz v. Emerson Hardwood Co.*, 565.)

See Reformation of Instruments, 3, 4.

NEW TRIAL.**Granting a New Trial After Time Limited Does not Affect Judgment of Nonsuit.**

See Abatement and Revival, 1.

NOTICE.**Notice—Irrigation District—Publication of Notice—Sufficiency of Affidavit of Publication.**

1. Affidavit of publication of notice of petition for irrigation district by "foreman of the ——— tribune" was not sufficient compliance with Section 833, L. O. L., requiring such affidavit to be made by the printer of the newspaper or his foreman or principal clerk. (*Hanley Co. v. Harney Valley Irr. Dist.*, 78.)

Notice—Organization of Irrigation District—Publication of Notice of Petition—Sufficiency of Affidavit.

2. Affidavit that notice of petition for organization of irrigation district was published "once a week for a period of four weeks beginning on the eighth day of August, 1917, and ending on the fifth day of September, 1917," was insufficient proof of compliance with Laws of 1917, page 744, Section 1, requiring such notice to be published "once each week for at least four successive weeks," since, under such affidavit, the publication would not necessarily have been made on four successive weeks. (*Hanley Co. v. Harney Valley Irr. Dist.*, 78.)

Notice of Appeal to Supreme Court.

See Appeal and Error, 11, 12.

Sufficiency of Notice of Appeal.

See Appeal and Error, 37.

Notice to Attaching Creditors.

See Attachment, 1, 2.

Notice to Confirm Sale Subject to Rule of Court.

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To Creditors Whose Demands are not Due.

See Fraudulent Conveyances, 3.

Notice of Establishment of Highway, When Sufficient.

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**Rights of Bona Fide Purchaser Without Notice When Mortgage
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See Vendor and Purchaser, 6.

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See Appeal and Error, 15.

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PARENT AND CHILD.

Collusion Between Father and Son.

See Attachment, 4.

PAROL CONTRACT.

See Specific Performance, 1, 2.

See Statute of Frauds, 2.

PARTIES.

Parties—Joinder—Complaint.

1. Whether there has been a proper joinder of parties defendant depends largely upon the case as stated by plaintiff in his complaint, however it may turn out upon the merits. (Sweeney v. Jackson County, 96.)

When Defect in Necessary Parties Defendant is Immaterial.

See Appeal and Error, 34.

Suit to Compel Conveyance by Trustee.

See Trusts, 2.

Necessary Parties.

See Venue, 1.

PARTNERSHIP.**Partnership—Silent Partner—Evidence.**

1. Plaintiff, in action for half of the expenses of an option taken in his name, *held* to have failed to establish by a preponderance of the evidence that defendant was a silent partner in the transaction. (*Wade v. Martin*, 1.)

Partnership—Duty of Partners—Good Faith.

2. One partner owes a duty to the other partner of fair dealing, and this relationship continues even after the dissolution of the partnership, as to the items or contracts or assets remaining unsettled. (*Runnells v. Leffel*, 342.)

Partnership—Dissolution—Action for Accounting—Pleading—Fraud—Neglect.

3. In suit against a former partner for an accounting, any fraud, neglect or misfeasance must be alleged in order to be available. (*Runnells v. Leffel*, 342.)

Partnership—Contracts—Accounting—Dissolution.

4. A contract with a partnership for the handling of real and personal property and the payment of commission for the sale thereof dies with the dissolution of the partnership, and where after dissolution one partner allows a contract of sale to be canceled, and a new contract is entered into whereby the seller transfers the property to a third person, another partner is not entitled to participate in a commission paid in connection with the second transfer. (*Runnells v. Leffel*, 342.)

Partnership—Accounting—Fraud—Necessity of Pleading.

5. In suit between partners for an accounting of commissions earned on a sale, which sale was not consummated by the buyer, but rescinded, and the property resold to the buyer's wife, to be available as a ground of recovery, fraud, collusive or otherwise, in that such second sale to the wife was a subterfuge to prevent plaintiff from receiving his share of the commission earned on the original sale, must be pleaded. (*Runnells v. Leffel*, 342.)

PAVING CONTRACTS.**Action on Bond of Contractor.**

See *Municipal Corporations*, 6.

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See *Taxation*, 1.

PERSONAL INJURIES.

See *Master and Servant*, 3-9.

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PLEADING.**Pleading—Election Between Defenses—Necessity.**

1. A defendant can be required to elect upon which of several defenses he will rely only where the facts stated as such defenses are

so inconsistent that, if the truth of one defense be admitted, it would necessarily destroy the other. (*Rehfuss v. Weeks*, 25.)

Pleading—Election Between Defenses—Inconsistent Statements.

2. In an action for damages for distributing water on plaintiff's land by a drainage ditch, no election was required where defendant pleaded a natural outlet and also that such natural outlet was changed and lowered by the construction of the ditch acquiesced in for more than 20 years. (*Rehfuss v. Weeks*, 25.)

Pleading—Reply—Departure.

3. In an action by the sales agent of cereal manufacturers for breach of contract, plaintiff's reply to defendants' affirmative answer, reciting acts which disclosed a course of conduct by defendants indicating a practical interpretation of the contract, and contending it was too late for them to repudiate such interpretation, held not to admit plaintiff's own prior default and to constitute a departure from the cause of action set forth in the complaint. (*Fletcher v. Fischer*, 265.)

Pleading—Inconsistent Defenses—Joining Pleas in Abatement and to Merits—Effect.

4. Section 74, L. O. L., as amended by Laws of 1911, Chapter 99, providing defendant may set forth by answer as many counterclaims as he has, including pleas in abatement, does not change the rule that defenses must be consistent, and that, where answer first denies a thing and then admits it, the latter controls; so a plea in abatement, on the ground that jurisdiction of the person had not been acquired, is overcome by a plea to the merits, in effect an allegation of general voluntary appearance. (*Duncan Lum. Co. v. Willapa Lum. Co.*, 386.)

Pleading—Identity of Causes not Established by Plea that Other Action was for Same Amount.

5. Identity of causes of action is not established by plea of other action pending, stating that the other action was for the same amount. (*Kuntz v. Emerson Hardwood Co.*, 565.)

Pleading—Plea of Identity of Parties and Subject Matter of Other Action a Conclusion of Law.

6. It is no more than a conclusion of law for a plea of other action pending to say that it involves the same parties and the same subject matter. (*Kuntz v. Emerson Hardwood Co.*, 565.)

Pleading—Plea that New Trial was Granted After Time Allowed by Law a Conclusion of Law.

7. Allegation of reply to plea of other action pending, that order granting new trial in such action was entered after the time allowed by law, is a mere conclusion of law. (*Kuntz v. Emerson Hardwood Co.*, 565.)

Pleading—Complaint, Though Demurrable, Sufficient Against Objection not Raised Below.

8. A complaint, in a suit to reform a deed by striking out a purported obligation of purchaser to pay a note and mortgage, and relieve him from liability to a deficiency judgment (Section 428, L. O. L.),

although subject to demurrer for not giving a more specific explanation of plaintiff's own conduct to show that the mistake did not arise from his own gross negligence, *held* sufficient as against an objection thereto urged for the first time upon appeal, as every reasonable inference should be given in favor of the complaint that can be drawn therefrom. (*Welch v. Johnson*, 591.)

Pleading—New Matter in Substance Amounting Merely to Denials Requires No Reply.

9. Where following the words, "This defendant admits and alleges," the answer makes affirmative statements which in form are new matter, but in substance amount merely to denials, a reply is unnecessary. (*Welch v. Johnson*, 591.)

Pleading—Sufficiency of Complaint in Replevin Alleging Ownership and Right of Possession.

10. In replevin for possession of a bond, the complaint alleging that plaintiff was the owner and entitled to possession was sufficient without amendment; plaintiff not being required to plead its evidence. (*Farmers & Fruit-Growers' Bank v. Davis*, 655.)

See Attorney and Client, 1-4.

See Parties, 1.

See Partnership, 3.

See Reformation of Instruments, 7.

Sufficient to Charge Collusion.

See Attachment, 3.

Sufficiency of Petition in Disbarment Proceeding.

See Attorney and Client, 1-4.

PORTLAND, CHARTER OF.

See Killingsworth v. Portland, 525.

PREMIUMS.

On Life Insurance Policy.

See Insurance, 1-13.

PRESUMPTION.

See Insurance, 14, 15.

See Master and Servant, 7.

That Deed is Absolute may be Overcome in Equity.

See Mortgages, 6.

PRINCIPAL AND AGENT.

Principal and Agent—Acts of Agent Within Apparent Scope of Authority—Instruction.

1. In suit for breach of contract by which plaintiff was to deliver to defendants a certain number of copies of its store paper service, defense being that defendants were induced to execute contract upon fraudulent representations of plaintiff's agent as to plaintiff having

contracts with other firms, *held*, that question of authority of agent was fairly and fully submitted. (Frayn v. Pennington, 187.)

Principal and Agent—Default of Agent—Failure to Remit—Reasonable Time and Demand.

2. Where the contract of a sales agent for cereal manufacturers was silent as to when remittances should be made by him, he could not be put in default by a failure to remit until after a reasonable time had elapsed and demand made by the manufacturers. (Fletcher v. Fischer, 265.)

Principal and Agent—Sales Agent—Damages—Evidence.

3. In an action against cereal manufacturers for breach of their contract to employ plaintiff exclusively as selling agent for five years, evidence of plaintiff's business as a jobber in groceries, its extent, expenses, increase and the increase of commissions on the particular cereal line, *held* competent and admissible on the issue of plaintiff's damages and permissible recovery. (Fletcher v. Fischer, 265.)

Principal and Agent—Sales Agent—Breach of Contract.

4. In an action against cereal manufacturers by their sales agent for breach of their contract to employ him exclusively for five years, evidence *held* sufficient to support verdict for plaintiff for \$17,000, damages, less \$5,500 already in his hands. (Fletcher v. Fischer, 265.)

PUBLIC IMPROVEMENTS.

See Dedication, 1.

See Municipal Corporations, 3-5, 8.

PUBLIC LANDS.

Public Lands—When Evidence Insufficient to Authorize Correction of Survey.

1. Evidence to show a mistake in a United States survey, which has been acted on and upheld by its Land Department and is presumed to be correct, *held* not of the clear and cogent character necessary to authorize the court to correct it, and overthrow the credit due it as established by the field-notes. (Robertson v. Martin, 326.)

PURSE-NETS.

See Fish, 1.

QUESTION FOR JURY.

See Insurance, 3.

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RATIFICATION.

Of Unauthorized Acts of Agent.

See Insurance, 9.

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See Appeal and Error, 21, 22.

REDEMPTION.

See Constitutional Law, 1.

See Mortgages, 1.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments—When Authorized for Mistake of Stenographer of Party.

1. Where both plaintiff, seeking to reform a deed by striking out a clause assuming a mortgage made by his grantors to mortgagee, and his grantors, agree that the clause was inserted by mistake, and no element of estoppel being available to the mortgagee, who was not induced by the assumption provision to change his position to his disadvantage, *held*, that purchaser was not guilty of such negligence in failing to read the deed prepared by his own stenographer, and executed and recorded by his grantors, as would prevent reformation of the deed. (Welch v. Johnson, 591.)

Reformation of Instruments—Preparation of Deed in Office of Plaintiff's Attorney No Defense.

2. Though the deed which plaintiff sues to correct was prepared in the office of his attorney, it was not necessarily any the less a mistake to include the disputed clause. (Welch v. Johnson, 591.)

Reformation of Instruments—Preparation of Deed in Office of Plaintiff's Attorney as Showing Negligence.

3. That the deed whose reformation is sought was prepared in the office of plaintiff's attorney is properly considered on the point that to be relieved from mistake it must appear the mistake was not due to party's negligence. (Welch v. Johnson, 591.)

Reformation of Instruments—Negligence Preventing Relief Against Mistake must be Violation of Duty.

4. The negligence which would prevent relief from mistake in a deed by reformation of the instrument must be such as amounts to violation of a positive duty owing the other party. (Welch v. Johnson, 591.)

Reformation of Instruments—Mortgage Assigned to Holders in Due Course Cannot be Reformed.

5. Against persons to whom note and mortgage security were assigned, before maturity and without knowledge of defects, by payee on their agreement to furnish him a home thereafter, their obligation in which respect they have fulfilled, there can be no reformation of the assigned instruments; the assignees being holders in due course, who under Section 5890, L. O. L., hold the instruments free from any defenses which might have been available against the payee. (Hallberg v. Harriet, 678.)

Reformation of Instruments—Burden of Proof on Plaintiff to Prove Mistake.

6. In action to correct alleged mutual mistake in indemnity policy, plaintiff has burden of proving the mistake by a preponderance of evidence. (*Peninsula Lum. Co. v. Royal Indemnity Co.*, 684.)

Reformation of Instruments—Complaint Must Allege Original Agreement and Point Out Mutual Mistake.

7. In suits to reform a written instrument on the ground of mistake, the complaint must clearly state what the original agreement of the parties was, and point out with precision wherein there was a misunderstanding, that the mistake was mutual and did not arise from the gross negligence of the plaintiff, or that the misconception originated in the fraud of the defendant. (*Peninsula Lum. Co. v. Royal Indemnity Co.*, 684.)

Reformation of Instruments—Evidence Insufficient to Show Mutual Mistake.

8. In action to correct employer's liability policy upon ground that words "No exceptions" had by mistake been placed after printed statement that no such insurance had "been canceled or the renewal thereof refused, except as follows," evidence *held* to preponderate against the claim that the mistake was mutual. (*Peninsula Lum. Co. v. Royal Indemnity Co.*, 684.)

See Appeal and Error, 34.

RELEASE.

Release—Fraudulent Release—Return of Consideration—Necessity—Deduction from Verdict.

1. Where a release for personal injuries is obtained by fraud, a return or tender of the consideration paid is not a requisite to maintaining an action for damages by plaintiff, and upon a judgment for him it is sufficient if the amount received on the release be deducted from the verdict. (*Franklin v. Webber*, 151.)

RENT.

One Remaining in Possession cannot Escape Payment of Rent

See Landlord and Tenant, 1.

Apportionment of Rent and Effect of Death of Life Tenant.

See Life Estates, 1-4.

REPLEVIN.

Sufficiency of Complaint in Replevin Alleging Ownership and Right of Possession.

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RESCISSION.**Rescission of Contract.**

See Vendor and Purchaser, 4.

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Right to Review Establishment of County Road not Waived by Appeal from Assessment.

See Highways, 14.

Questions of Law and Fact not Reviewable on Writ of Review.

See Municipal Corporations, 7.

RULES.**Of a Railroad Company.**

See Master and Servant, 1.

SALES.**Sales—Fraudulent Representations of Seller's Agent—Instruction.**

1. In suit for breach of contract by which plaintiff was to deliver to defendants a certain number of copies of its store paper service, defense being that defendants were induced to execute contract upon fraudulent representations of plaintiff's agent as to plaintiff having contracts with other firms, *held*, that question of fraud was fully and fairly submitted. (*Frayn v. Pennington*, 187.)

Sales—Action for Breach—Damages—Evidence.

2. In an action for breach of a contract to purchase and pay for cordwood cut by plaintiff, plaintiff's testimony as to the cost of the stumpage and of the cutting and hauling *held* to afford a basis for the computation of damages. (*Newman v. Multnomah Fuel Co.*, 247.)

Sales—Failure to Deliver—Measure of Damages.

3. The measure of damages for failure to deliver merchandise, in accordance with contract, if the articles have a market value, is the difference between the contract price and the market value at time and place of delivery. (*Duncan Lum. Co. v. Willapa Lum. Co.*, 386.)

Sales—Failure to Deliver—Damages—Purchase of Goods Elsewhere.

4. While buyer is not required to go into the market and purchase goods elsewhere before bringing his action for seller's failure to deliver, he may, if he sees fit, do so, and if in a successful effort to minimize the damage he incurs expense, he may recover such expenditures as an element of damages, so long as the total recovery does not exceed the difference between the contract price and market price (*Duncan Lum. Co. v. Willapa Lum. Co.*, 386.)

Sales—Failure to Deliver—Extension of Time for Delivery—Evidence

5. In buyer's action for seller's failure to deliver, evidence as to agreement to extend time for delivery *held* sufficient. (*Duncan Lum. Co. v. Willapa Lum. Co.*, 386.)

Sales—Failure to Deliver—Date of Breach—Evidence.

6. In buyer's action for seller's failure to deliver, where there was evidence of agreement to extend time of delivery, seller's letter to buyer, declining to make further deliveries, was admissible to fix date of breach. (*Duncan Lum. Co. v. Willapa Lum. Co.*, 386.)

See Evidence, 3.

Sales on a Del Credere Commission.

See Brokers, 1.

Status of Sales Agent.

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Where Buyer Accepted a Part of the Property Sold.

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SEASIDE, CHARTER OF.

See *Cole v. Seaside*, 5.

SILENT PARTNER.

See Partnership, 1.

SPECIFIC PERFORMANCE.

Specific Performance—Parol Contract—Part Performance—Sufficiency of Evidence.

1. In son's suit for specific performance of mother's parol contract to convey her interest in land owned by mother and son as tenants in common, evidence of son's possession of land under the agreement held not of that degree of clearness and certainty required to overcome the effect of the statute of frauds. (*Le Vee v. Le Vee*, 370.)

Specific Performance—Parol Land Contract—Part Performance—Evidence.

2. Generally a tenant in common, suing for specific performance of his cotenant's parol agreement to convey his interest in the common property, must prove the agreement, as well as his part performance of it, clearly and unequivocally by the preponderance of the evidence. (*Le Vee v. Le Vee*, 370.)

Specific Performance—There Being No Such Stipulation, Time is not Essence of Contract.

3. Though contract for exchange of properties names a period within which conveyances shall be executed and exchanged, there being no stipulation that time is of the essence, it will not be considered so in action for specific performance; the parties having used diligence and acted in good faith, and there not being any change of circumstances affecting the equities. (*Kaufman v. Hastings*, 623.)

Specific Performance—Contract of Married Man Relating to Realty Enforceable Against Him.

4. Contract of a married man to sell real estate, though not joined in by his wife may be specifically enforced against him. (*Kaufman v. Hastings*, 623.)

Specific Performance—Of Exchange of Properties not Ineffective for Failure to Assign Insurance.

5. Specific performance of contract for exchange of realty may not be complained of because of failure to assign insurance policies; the decree covering the matter, and it being necessary to validity of such assignment that the properties be first exchanged. (*Kaufman v. Hastings*, 623.)

STATE HIGHWAY ENGINEER.

Estimate Made by State Highway Engineer.

See Highways, 1-4.

STATES.

States—State not Liable for Costs in Absence of Statute.

1. The state is not liable for costs and disbursements unless there is some statute which expressly or by clear and necessary implication includes it, since the mere general terms of a statute giving costs do not include the sovereign. (*State of Oregon v. Ganong*, 440.)

STATUTE OF FRAUDS.

Statute of Frauds—Sale of Goods—Acceptance of Part.

1. Where the oral buyer of 2,500 cords of wood received and accepted at least 150 cords, the case came within the exception to the statute of frauds (Section 808, subdivision 5, L. O. L.), providing that an agreement for the sale of personalty at a price not less than \$50 must be in writing, unless the buyer accepted and received some part of the property. (*Newman v. Multnomah Fuel Co.*, 247.)

Statute of Frauds—Part Contract—Part Performance—Tenancy in Common.

2. Possession by tenant in common to constitute such part performance of his cotenant's agreement to sell her interest in the common property as to take the contract out of the statute of frauds must result in such a change of relation between the parties as would challenge the attention of anyone seeing the change, and would indicate that some contract had been made. (*Le Vee v. Le Vee*, 370.)

Statute of Frauds—Avoidance of Contract—Degree of Proof.

3. The statute of frauds is stringent in its provisions, and to avoid its effect the testimony must be clear and explicit, showing a state of facts referable exclusively to the contract pleaded. (*Le Vee v. Le Vee*, 370.)

STATUTE OF UNITED STATES.

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STATUTES.

Statutes—Construction—Copied Statutes—Intent of Legislature.

1. The rule that, where a statute is copied from that of another state, the construction of the duplicated statute by the highest court of the state from which it is taken will be adopted, does not apply

where the legislature adopting the latter statute had a different intention. (*Peery v. Fletcher*, 43.)

Statutes—Implied Repeal not Favored.

2. Implied repeals are not favored. (*Killingworth v. Portland*, 525.)

Statutes—Statutes Should not be Construed Retrospectively to Interfere With Judicial Proceedings.

3. Unless there is a clear intent to the contrary, statutes should not be construed retrospectively, or so as to interfere with pending judicial proceedings. (*Rice v. Douglas County*, 551.)

See Appeal and Error, 8.

See Costs, 2.

See Homestead, 1, 3, 4.

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Effect of Saving Clause of Repealing Statute.

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Draining Surface Water on Adjacent Lands.

See Waters and Watercourses, 4.

SURVEY.

When Evidence is Sufficient to Authorize Correction of Survey.

See Public Lands, 1.

SURVEYOR.

When Notes of County Surveyor and Viewers are Sufficient.
See Highways, 13.

TAXATION.

Taxation—Payment—Time—Constitutionality of Statutes.

1. It was within the power of the legislature to pass Section 3682, L. O. L., as amended by Laws of 1913, page 334, Section 20, requiring taxpayers to pay their taxes on April 1st, but permitting them to then pay one half of the sum due and allow the remainder to run until September 1st, by paying a sum equivalent to one per cent a month on the unpaid balance. (*Spexarth v. Sherman*, 254.)

TENANCY IN COMMON.

Tenancy in Common—When devisees Become Tenants in Common.

1. Where a mother died seised of land with her son as tenant in common, the other children, the will devising to the son a life estate in the mother's share of the tract, subject to payment of certain charges, became tenants in common with the son; joint tenancy having been abolished by Section 7175, L. O. L. (*Le Vee v. Le Vee*, 370.)

Tenancy in Common—No Tenant can Do Act Affecting Title of Another.

2. Tenants in common hold their interest in the realty independently of each other, and neither one can do an act respecting the title which will bind the others. (*Le Vee v. Le Vee*, 370.)

Tenancy in Common—Grantee of Tenant in Common Becomes Such.

3. The grantee of a tenant in common becomes merely a new tenant in common with the remainder of the original holders. (*Le Vee v. Le Vee*, 370.)

Tenancy in Common—Single Cotenant can Recover Possession of Whole Land Against Stranger.

4. As against a stranger, one tenant in common may recover possession of the whole of the land held by himself and his cotenants. (*Le Vee v. Le Vee*, 370.)

See Statute of Frauds, 2.

TENDER.

What Constitutes.

See Vendor and Purchaser, 3.

TIME.

Time—Filing Report of Establishment of Highway Day After Holiday Sufficient.

1. It being impossible to file on June 5th, the day of the general primary election, and a public holiday by proclamation of the Governor, the report of viewers and county surveyor directed to locate a proposed county road, a filing on the next day was sufficient, and the court did not lose jurisdiction because the report was not filed

on the holiday, as prescribed in the order. (*Rice v. Douglas County*, 551.)

In Which to File Transcript on Appeal.

See Appeal and Error, 1.

Extending Time to File Transcript on Appeal.

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Filing of Transcript Within Statutory Time or Extension Thereof Jurisdictional.

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For Adjustment of Commissions Identical With Period for Making Exchange.

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Is the Essence of a Life Insurance Contract.

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When Time is not Essence of Contract.

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Requiring Taxpayers Certain Time in Which to Pay Taxes.

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Period in Which to File Transcript.

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Filing of Transcript Within Statutory Time or Extension Thereof Jurisdictional.

See Appeal and Error, 39.

Bill of Exceptions Containing Transcript of All Evidence Sufficient.

See Exceptions, Bill of, 1.

TRIAL.

Trial—Instructions—Requests.

1. In an action for damages to land by distribution of water through a drainage ditch, a requested instruction that water cannot be discharged on the property of another without his consent and to his injury in greater quantities than that in which it would naturally flow, held covered by other instructions given. (*Reh fuss v. Weeks*, 25.)

Trial—Rebuttal Evidence—Discretion.

2. In buyer's action for seller's failure to deliver lumber, where evidence as to market value was allowed to take a wide range upon the

part of both litigants, and seller introduced evidence of individual sales from June to September, court's action in permitting plaintiff, during rebuttal, to introduce evidence of three sales during months of April, August and December was not manifest abuse of discretion. (*Duncan Lum. Co. v. Willapa Lum. Co.*, 386.)

Trial—Instructions—Evidence.

3. Instructions directing jury to "do the best you can, according to all the evidence that has been introduced," *held* not subject to objection that it permitted jury to indulge in speculation in reaching verdict. (*Duncan Lum. Co. v. Willapa Lum. Co.*, 386.)

Trial—Instructions—Construction.

4. It is not prejudicial error to give an incorrect instruction where, in view of the other instructions given and the testimony in the case, the jury could not have been misled. (*Hinkson v. Kansas City Life Ins. Co.*, 473.)

See Criminal Law, 1.

TRUST DEED.

To Secure Debt Conveys Legal Title Only to Enforce Trust.

See Mortgage, 10.

TRUSTS.

Trusts—Active Trust—Title of Beneficiaries.

1. Where plaintiff holder of legal title conveyed lands to defendant as trustee to sell and dispose of the same for the mutual benefit of plaintiff, defendant, and H., and defendant had the land surveyed and platted, sold portions, applying proceeds as agreed, and at the request of his associates conveyed to each of them certain portions, which were unsalable, leaving the property involved still undisposed of, *held*, that trust as to lots involved continued until prospective purchasers should make their final payments, so that plaintiff and his assignees had no interest in the land, but simply in the proceeds. (*Furuset v. Mays*, 191.)

Trusts—Suit to Compel Conveyance by Trustee—Parties.

2. Where plaintiff holder of legal title conveyed lands to defendant as trustee to sell and dispose of the same for the mutual benefit of plaintiff, defendant, and H., and plaintiff undertook to convey to R. an undivided one-third interest, R. and H. would be necessary parties to suit to compel defendant to convey the undivided one third to R.; the trust still existing. (*Furuset v. Mays*, 191.)

UNDERTAKING.

See Appeal and Error, 20, 27, 31, 32, 35, 36.

UNITED STATES STATUTES.

Cited and Construed in this Volume.

See Table in Front of this Volume.

VENDOR AND PURCHASER.

Vendor and Purchaser—When Evidence Shows Sale in Gross.

1. Trade, for a house and \$2,000, of a farm represented in the conveyance as 24.75 acres, according to government survey, "be the same more or less," *held* in gross, and not by the acre. (*Robertson v. Martin*, 326.)

Vendor and Purchaser—When Evidence Shows No Fraudulent Representations.

2. Evidence *held* to sustain finding that there was no fraudulent representation in the trade of a farm. (*Robertson v. Martin*, 326.)

Vendor and Purchaser—Tender—What Constitutes.

3. Plaintiff's letter inquiring what balance remained to be paid on a land contract and expressing a desire to secure a deed as soon as possible, *held* insufficient to show a tender of amount due under the contract. (*McCracken v. Bay City Land Co.*, 461.)

Vendor and Purchaser—Rescission of Contract—Independent Covenant.

4. A vendor's agreement to clear the lots, grade street, and lay a water-main *held* an independent covenant not authorizing the purchaser to rescind contract upon its breach. (*McCracken v. Bay City Land Co.*, 461.)

Vendor and Purchaser—Mortgagee Satisfying Mortgage by Mistake has No Remedy Against Innocent Purchaser.

5. The owner of a mortgage who satisfied it by mistake is not entitled to have the mistake corrected and the mortgage reinstated as against the intervening rights of *bona fide* purchasers and encumbrancers. (*Dennison v. Jossi*, 581.)

Vendor and Purchaser—Rights of Bona Fide Purchasers and Encumbrancers Without Notice When Mortgage Erroneously Satisfied.

6. Where the owner of two mortgages through mistake satisfied one which he did not intend to satisfy, and after the satisfaction was indorsed on the record, the premises were disposed of and a subsequent mortgage given, *held*, that the last purchaser and the mortgagee took the same without any constructive notice, so that the mortgagee was not entitled to have the mortgage reinstated, the purchaser and subsequent encumbrancer having no actual notice. (*Dennison v. Jossi*, 581.)

VENUE.

Venue—Action Against County—"Necessary Party."

1. Contractor's action on road building contract against county and bank to which contractor had assigned as collateral security amount due under pretended final estimate of county's indebtedness claimed by contractor to be erroneous, but which bank insisted could not be set aside to its prejudice, was properly brought in county in which bank was situated, though different from defendant county, under Section 396, subdivision 3, L. O. L.; the bank being a "necessary party" under Section 393. (*Sweeney v. Jackson County*, 96.)

VERDICT.

See Appeal and Error, 5.

When Deduction from Verdict is Required.

See Release, 1.

VIADUCT.**May be Constructed as Part of Street Improvement.**

See Municipal Corporations, 9.

VIEWERS.**When Notes of Viewers and Surveyor are Sufficient.**

See Highways, 13.

Qualification of Viewers, When Sufficiently Shown.

See Highways, 15.

WAIVER.

See Appearance, 2.

Right to Review Establishment of County Road not Waived by Appeal from Assessment.

See Highways, 14.

Of Limitation of Authority of Agent.

See Insurance, 13.

WATERS AND WATERCOURSES.**Waters and Watercourses—Drainage—Action for Damages—Instructions.**

1. In an action for damages to land by distribution of water through a drainage ditch, an instruction as to changing a natural watercourse and restoring the same to its original channel within the confines of defendant's own land *held* properly refused as inapplicable to the issues. (*Rehfuss v. Weeks*, 25.)

Waters and Watercourses—Diversion or Change of Natural Streams—Liability.

2. When a small natural stream is straightened and deepened so as to confine the waters thereof within a smaller compass, thereby increasing the tillable land, in such a manner as not to increase the amount of water, or change the place of discharge on a neighbor's land, no cause of action arises. (*Rehfuss v. Weeks*, 25.)

Waters and Watercourses—Action for Injuries—Instructions—Surface Water.

3. In an action for damages to land by distribution of water from a drainage ditch, an instruction that, if defendant cast water from his property permeating the surrounding soil and percolating into plaintiff's land to his injury, verdict should be for plaintiff, was properly refused as ignoring the rule as to surface water. (*Rehfuss v. Weeks*, 25.)

Waters and Watercourses—Surface Water—Drainage.

4. The owner of upper lands is not prohibited by the rule as to surface water from cultivating his lands or draining them by artificial

ditches, though surface water is thereby precipitated more rapidly upon the lands of the adjacent owner below, provided he does not cause water to flow on such lands, which, but for the artificial ditches, would have flowed in a different direction, and provided he acts with a prudent regard for the adjacent owner's interest. (*Reh fuss v. Weeks*, 25.)

Waters and Watercourses—Organization of Irrigation District—Publication of Petition—Jurisdictional Requirement.

5. Laws of 1917, page 744, Section 1, requiring publication of petition for organization of irrigation district once each week for at least four successive weeks before the time at which it is to be presented, is a jurisdictional requirement. (*Hanley Co. v. Harney Valley Irr. Dist.*, 78.)

Waters and Watercourses—Organization of Irrigation District—Sufficiency of Petition.

6. Petition for organization of irrigation district under Laws of 1917, page 744, Section 1, held sufficient compliance with requirements of such statute. (*Hanley Co. v. Harney Valley Irr. Dist.*, 78.)

Waters and Watercourses—Irrigation District—Petition—Qualification of Subscribers.

7. Petition for irrigation district is not required in view of Laws of 1917, page 744, Section 2, to enumerate the qualifications of subscribers under Section 29. (*Hanley Co. v. Harney Valley Irr. Dist.*, 78.)

Waters and Watercourses—Irrigation District—Proceedings for Organization.

8. The same technical precision that is observed in a regular law action is not required in a proceeding for the organization of an irrigation district before the County Court. (*Hanley Co. v. Harney Valley Irr. Dist.*, 78.)

Waters and Watercourses—Irrigation District—Proceedings for Organization—Order of Court on Final Hearing.

9. Under Laws of 1917, page 744, Section 2, as amended by Laws of 1919, page 442, providing that upon final hearing of petition for organization of irrigation district court shall make an order determining *inter alia* whether the requisite number of owners of the land within proposed district shall have petitioned for the formation thereof, such order should state all the facts found or determined by the court upon such hearing. (*Hanley Co. v. Harney Valley Irr. Dist.*, 78.)

Waters and Watercourses—Irrigation District—Exclusion of Land from District.

10. Upon petition for irrigation district and objection thereto by owner and requests to exclude land from proposed district, an issue is raised requiring proof of actual conditions existing before court can determine whether land should be excluded, in view of Laws of 1917, page 769, Section 37, subdivision (d). (*Hanley Co. v. Harney Valley Irr. Dist.*, 78.)

Waters and Watercourses—Irrigation Districts—Proceedings for Organization—Order of County Court—Jurisdiction to Issue.

11. Where the proof of publication of notice of petition for irrigation district was defective in failing to show compliance with Laws

of 1917, page 744, Section 1, requiring publication once each week for at least four successive weeks, and the County Court nevertheless proceeded with final hearing under Section 2, it would be the duty of the Circuit Court as upon a judicial examination of the proceedings as provided for in Section 41 to set aside the order of the County Court for want of jurisdiction. (*Hanley Co. v. Harney Valley Irr. Dist.*, 78.)

WITNESSES.

See Criminal Law, 1.

Mileage for Nonresident Witnesses from State Line Allowed.

See Costs, 4.

WORDS AND PHRASES.

Words and Phrases—"Cash."

1. Ordinarily, the word "cash" means money, but it is frequently used as a term meaning the opposite of credit. (*Hartwig v. Rushing*, 6.)

Words and Phrases—"Gilt Edge."

2. The term "gilt edge," as applied to commercial paper, is a colloquialism, meaning of the best quality or highest price, first class, and not implying that a note which is not gilt edge is not collectible, or that the maker is irresponsible. (*Martin v. Moreland*, 61.)

"Adobe"—See *Sweeney v. Jackson County*, 96.

"Barter"—See *Hartwig v. Rushing*, 6.

"Cash"—See *Hartwig v. Rushing*, 6.

"Earth"—See *Sweeney v. Jackson County*, 96.

"Escrow"—See *McPherson v. Barbour*, 509.

"Filing"—See *Robinson v. Phogley*, 299.

"Gilt edge"—See *Martin v. Moreland*, 61.

"Hard-pan"—See *Sweeney v. Jackson County*, 96.

"Jurisdiction"—See *Ralston v. Bennett*, 519.

"Jurisdiction of subject matter"—See *Duncan Lum. Co. v. Willapa Lum. Co.*, 386.

"Mortgage to secure payment of the balance of the purchase money"—See *Ladd & Tilton v. Mitchell*, 668.

"Necessary party"—See *Sweeney v. Jackson County*, 96.

"Purchase-money mortgage"—See *Ladd & Tilton v. Mitchell*, 668.

"Sale"—See *Hartwig v. Rushing*, 6.

"Shaft"—See *Franklin v. Webber*, 151.

"Trial"—See *State of Oregon v. Pacific Live Stock Co.*, 196.

"Under control"—See *Fuller v. Oregon-Wash. R. & N. Co.*, 160.

WORKMEN'S COMPENSATION.

See Evidence, 1.

See Master and Servant, 1, 2.

WRIT OF REVIEW.

Questions of Law and Fact not Reviewable on Writ of Review.

See Municipal Corporations, 7.

E. J. M.
9/11/20



